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Attorneys for **Appellee,**
Alan Stanly

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In Re:	)	Case No. 08cv0713 JAH (WMc)
)	
FRANCIS J. LOPEZ,	)	Bankruptcy No. 05-05926-PB7
)	
Debtor.)	
	)	APPELLEE'S SUPPLEMENTAL
FRANCIS J. LOPEZ,	)	APPENDIX
)	
Appellant,	)	VOLUME 1 OF 3
)	
v.	)	Hearing: September 15, 2008
	)	Time: 2:30 p.m.
ALAN STANLY,	)	Department: Courtroom 11
	)	Judge: Hon. John A. Houston
Appellee.)	

Appellee Alan Stanly ("Stanly"), respectfully submits his Appellee's Supplemental Appendix containing excerpts from the record cited in the Appellee's Brief filed concurrently herewith.

Date: August 8, 2008

KEEHN & ASSOCIATES, APC

By: //s// L. Scott Keehn
 L. Scott Keehn
 Leslie F. Keehn
 Attorneys for **Appellee,**
Alan Stanly

KEEHN & ASSOCIATES, APC
 ATTORNEYS AND COUNSELORS AT LAW
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APPELLEE'S SUPPLEMENTAL APPENDIX
VOLUME 1 OF 3

EXCERPTS OF THE RECORD ON APPEAL
(IN CHRONOLOGICAL ORDER)

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TAB 6

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4 Woodland Hills, CA 91367
5 Telephone: (818) 710-3656
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7 jhayes@polarisnet.net

8 Attorneys for Alleged Debtor Francis Lopez

9
10 **UNITED STATES BANKRUPTCY COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
12 **SAN DIEGO DIVISION**

13 In Re:

14 FRANCIS J. LOPEZ,
15
16 Alleged Debtor

CASE NO. 05-05926-PBINV

Involuntary Chapter 7

**MOTION TO DISMISS OR
TRANSFER INVOLUNTARY
PETITION; DECLARATION OF
FRANCIS J. LOPEZ**

Date: August 22, 2005
Time: 10:00 a.m.
Ctvm: 4

23 TO THE HONORABLE PETER W. BOWIE, UNITED STATES BANKRUPTCY
24 JUDGE, TO PETITIONING CREDITOR ALAN STANLY AND ALL INTERESTED
25 PARTIES:
26
27
28

I.

STATEMENT OF FACTS

Francis J. Lopez and the single petitioning creditor Alan Stanly have been involved in significant litigation against each other since before the bankruptcy filing of their entity Prism Advanced Technologies, Inc. ("Prism") This litigation has been bitterly fought for the past two years and is now pending in Superior Court between the parties, namely Lopez v Stanly, Case No. GIN029692, filed on May 14, 2003, San Diego Superior Court, North County. In that matter, Mr. Lopez is suing Mr. Stanly for numerous causes of action, including invasion of privacy, breach of fiduciary duty, trespass and identity theft. Mr. Stanly filed a cross-complaint, of course. Recently, in a second case, Mr. Stanly was successful in obtaining a judgment against Mr. Lopez for approximately \$50,000 relating to a guarantee both had made to Union Bank of a Prism loan. This involuntary chapter 7 petition is simply an extension of the litigation and a new strategy by Mr. Stanly to cause as much business and personal pain to Mr. Lopez as possible.

In any event, Mr. Lopez has been a permanent resident of Florida since July, 2003 when he and his family moved there from California. He owns a residence in Florida and is employed there. None of his creditors other than Stanly have any particular nexus to California. If an involuntary proceeding is appropriate, which it absolutely is not, it should proceed in the Northern District of Florida.

Finally, as to the merits, Mr. Lopez has well more than 12 creditors as Mr. Stanly knows very well. Yet Mr. Stanly is the only petitioning creditor. Mr. Lopez is generally paying his debts as they become due except, of course, the purported debt owed to Mr. Stanly. If this matter is not dismissed, Mr. Stanly will provide that information in his Answer pursuant to FRBP 1003(b).

II.

STATUTORY BASIS FOR MOTION TO DISMISS

The statutory basis for a Motion to Dismiss this involuntary case is set forth in F.R.C.P. 12(b)(3) and (6). That rule states:

Rule 12. Defenses and Objections--When and How Presented--By Pleading or Motion--Motion for Judgment on the Pleadings

(a) When Presented.

(1) Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer

(A) within 20 days after being served with the summons and complaint, or

...

(b) How Presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, . . . (6) failure to state a claim upon which relief can be granted, . . .

(h) Waiver or Preservation of Certain Defense

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

This case should be dismissed for three reasons: 1) It was filed in bad faith by Mr. Stanly as a completely transparent litigation strategy, attempting to change, in a fundamental way, the framework of the pending litigation between the parties. 2) If an involuntary bankruptcy filing were appropriate, proper venue is in Florida where Mr. Lopez lives and works, and all of his assets and creditors except Mr. Stanly are located. 3) There is no basis for the involuntary filing and therefore there is a failure to state a claim upon which relief can be granted. Mr. Lopez has more than 12 creditors and therefore more than one petitioning creditor is required and Mr. Lopez is paying his debts as they become due except the purported debt owed to Mr. Stanly.

III.

THE CASE SHOULD BE DISMISSED OR TRANSFERRED BECAUSE OF IMPROPER VENUE

The venue of a bankruptcy case is governed by 28 USC Section 1408 which states:

§ 1408. Venue of cases under title 11

Except as provided in section 1410 of this title, a case under title 11 may be commenced in the district court for the district--

(1) in which the domicile, residence, principal place of business in the United States, or principal assets in the United States, of the person or entity that is the subject of such case have been located for the one hundred and eighty days immediately preceding such commencement, or for a longer portion of such one-hundred-and-eighty-day period than the domicile, residence, or principal place of business, in the United States, or principal

1 assets in the United States, of such person were located in any other district;

2 or

3 (2) in which there is pending a case under title 11 concerning such person's affiliate,
4 general partner, or partnership.

5
6 Mr. Lopez is domiciled in Florida, and has been for more than two years. He has no
7 assets or business in California. He and his wife are both employed in Florida where they
8 own a home.

9 The basis for Mr. Stanly's claim that venue is proper in the Southern District of
10 California is the pending case of Prism Advanced Technologies, Inc., Case No. 03-07777-
11 JM7 (the Prism Bankruptcy"). The Prism Bankruptcy has been pending since an order for
12 relief was entered on September 18, 2003. Mr. Lopez was one of the two shareholders of
13 Prism, Mr. Stanly being the other. The trustee in the Prism Bankruptcy case sued Mr.
14 Lopez for turnover but the matter was easily resolved by stipulation between the trustee
15 and Mr. Lopez. Other than that proceeding, Mr. Lopez has had no involvement in the
16 Prism Bankruptcy case.

17 Since this involuntary case was not filed in the proper venue, existing defects in
18 venue must be cured under 28 USC § 1406(a) by requiring that the case be dismissed or
19 transferred to the proper venue. Once venue is contested and found to be improper, the
20 bankruptcy court in San Diego may not retain the case based on convenience of the parties,
21 but rather must dismiss it or transfer it pursuant to Section 1406(a) and FRBP 1014(a)(2).

22
23 This holding is supported by FRBP and its history.

24 **FRBP 1014 Dismissal and Change of Venue**

25 **(a) Dismissal and Transfer of cases**

26 **(1) Cases filed in proper district**

27 If a petition is filed in a proper district, on timely motion of a party in
28 interest, and after hearing on notice to the petitioners, the United States

1 trustee, and other entities as directed by the court, the case may be
 2 transferred to any other district if the court determines that the transfer is in
 3 the interest of justice or for the convenience of the parties.

4
 5 The involuntary petition was filed (as an obvious litigation tactic) in this district
 6 even though there is an available district with substantially stronger venue facts. For that
 7 reason, "in the interest of justice," the case should be dismissed or transferred to Florida.
 8 Mr. Lopez requests that if the court will not dismiss this case, it be transferred to Florida
 9 before any adjudication is made on any other issue. The issue of improper venue must be
 10 raised at the commencement of the action or it is waived. Once the court determines that
 11 venue is more proper in another district, the case should be dismissed or transferred.

12 In re Bankers Trust, 403 F.2d 16 (7th Cir. 1968) (factors to be considered are
 13 proximity of creditors of every kind, proximity of debtors to court, proximity to court of
 14 witnesses necessary to administration of estate, location of assets, economical and efficient
 15 administration of estate, and intertwined relationships of debtors); In re Peachtree Lane
 16 Associates, Ltd., 188 B.R. 815, (Bkrtcy N.D.Ill.1995)(court should address whether
 17 transfer of underlying bankruptcy case or adversary proceeding would promote efficient
 18 administration of bankruptcy estate, judicial economy, timeliness, and fairness); In re
 19 Jolly, 106 B.R. 299 (Bkrtcy.M.D.Fla.1989)(Principal criteria are proximity of creditors and
 20 debtors to court, proximity of witnesses necessary to administration of estate, location of
 21 assets, and economic and efficient administration of estate).

22 It will be extremely difficult for a chapter 7 trustee in San Diego to administer this
 23 case when the debtors live, work and have all of their assets more than 3,000 miles away.
 24 The administration will be far from "economical and efficient." The case should be
 25 dismissed.

IV.

**THE COURT SHOULD ABSTAIN FROM HEARING
THE MATTER AND DISMISS**

The court should abstain from proceeding with this matter pursuant to Section 305 which states:

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

Clearly the interests of creditors and the debtor would be better served by dismissing this case. If Mr. Stanly wants to pursue an involuntary proceeding in Florida, that is his right.

In the matter of In re Spade, 258 B.R. 221 (Bankr.D.Colo.2001), the court found that

The interests of the creditors and alleged debtor were better served by dismissing the involuntary Chapter 7 petition, pursuant to Section 305, since the petitioning creditors filed the petition not to commence an orderly and fair distribution of alleged debtor's assets to all creditors, but as a litigation tactic to control the forum and to gain an advantage.

In Spade, two lawsuits involving the parties were pending in state court. The court said that "the case is little more than a two-party collection dispute," and dismissed it. That is almost exactly if not exactly the same as the facts here.

In re Hall, Bayoutree Associates, Ltd., 939 F.2d 802 (9th Cir. (Ariz.) 1991), the court stated:

1 A review of the record reveals that the district court did not abuse its
 2 discretion in dismissing the case. Although dismissal of an action for
 3 improper venue is a harsh penalty, dismissal is proper where filing in an
 4 improper forum evidences bad faith. *See* 1 J. Moore, A. Vestal & P. Kurland,
 5 Moore's Manual, Federal Practice and Procedure, § 7.13[1] (1990); *cf.*
 6 Phillips v. Illinois Cent. Gulf R.R., 874 F.2d 984, 986 (5th Cir.1989). We
 7 therefore affirm the district court's dismissal of the case.

8
 9 This case reeks of bad faith. It has long been a rule of bankruptcy that a case may
 10 be dismissed if it was filed in bad faith. In In re Stolrow's Inc., 84 B.R. 167 (9th Cir. BAP
 11 (Cal.) 1988), the BAP confirmed that dismissal of a chapter 11 case for lack of good faith
 12 "is a matter for the bankruptcy court's discretion." In In re St. Paul Self Storage Ltd.
 13 Partnership, 185 B.R. 580 (9th Cir. BAP (Ariz.) 1995), the court found the existence of
 14 cause since the case was essentially "a two-party dispute capable of prompt adjudication in
 15 state court."

16 This case has been filed in bad faith because the bankruptcy filing will remove Mr.
 17 Lopez as the plaintiff in the case against Mr. Stanly. Mr. Lopez will be replaced by a
 18 trustee who presumably will have no motivation to fight against Mr. Stanly and will settle.
 19 This is a litigation tactic and should not be condoned and the case should be dismissed.

20 21 V.

22 CONCLUSION

23 The alleged debtor asks this court to dismiss this involuntary proceeding on the

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1 grounds of improper venue, bad faith and/or abstention. If Mr. Stanly really believes that
2 an involuntary bankruptcy is appropriate, he can refile in the Northern District of Florida.

3
4 Respectfully submitted,

5 LAW OFFICES OF M. JONATHAN HAYES

6
7
8 Dated: July 19, 2005

By: 

M. Jonathan Hayes, attorney for Francis J. Lopez

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12
13 Signature by the attorney constitutes a certification under Fed. R. Bankr. P. 9011
14 that the relief provided by the order is the relief granted by the court.

15
16 Submitted by:

17
18 By: 

19 M. Jonathan Hayes
20 Attorney for Francis J. Lopez

DECLARATION OF FRANCIS J. LOPEZ

I, Francis J. Lopez, declare as follows:

1. I am the alleged debtor in this matter. The statements made herein are of my own personal knowledge and if called upon to testify, I could and would competently testify thereto.

2. I was one of the two shareholders of Prism Advanced Technologies, Inc. ("Prism"), Mr. Stanly being the other. The trustee in the Prism Bankruptcy case sued me for turnover of assets but the matter was easily resolved by stipulation between the trustee and myself. Other than that proceeding, I have had no involvement in the Prism Bankruptcy case.

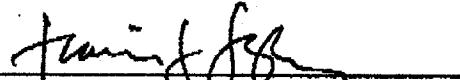
3. Alan Stanly and I have been involved in significant litigation against each other since before the bankruptcy filing of our entity Prism. In fact, litigation is pending right now in Superior Court between us, namely Lopez v Stanly, Case No. GIN029692, filed on May 14, 2003, pending in San Diego Superior Court, North County. In that matter, I sued Mr. Stanly for numerous causes of action, including invasion of privacy, breach of fiduciary duty, trespass and identity theft. Mr. Stanly filed a cross-complaint, of course. Recently, in a second case, Mr. Stanly was successful in obtaining a judgment against me for approximately \$50,000 relating to a guarantee both had made to Union Bank of a Prism loan. This involuntary chapter 7 petition is simply an extension of the litigation and a new strategy by Mr. Stanly to cause me and my family as much business and personal pain as possible.

4. I have been a permanent resident of Florida since July, 2003 when my wife and I and our two children moved here from California. We own a residence in Florida and are both employed there. None of my creditors other than Stanly have any particular nexus to California. I have more than 12 creditors and am generally paying my debts as they become due except, of course, the purported debt owed to Mr. Stanly. I have no

1 assets or business in California.
2
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4 I declare under penalty of perjury under the laws of the United States of America
5 that the foregoing is true and correct to the best of my knowledge and belief.

6 Executed this 19th day of July, 2005 at Destin, FL.

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8 Francis J. Lopez
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TAB 16

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
Minute Order**

Hearing Information:

Debtor: FRANCIS J. LOPEZ
Case Number: 05-05926-PB7 **Chapter:** 7
Date / Time / Room: MONDAY, AUGUST 22, 2005 02:30 PM DEPARTMENT 4
Bankruptcy Judge: PETER W. BOWIE
Courtroom Clerk: MARCIA PEARSON
Reporter / ECR: LYNETTE ALVES

Matter:

ALLEGED DEBTOR'S MOTION TO DISMISS OR TRANSFER INVOLUNTARY PETITION TO THE
NORTHERN DISTRICT OF FLORIDA

Appearances:

M. Jonathan Hayes, ATTORNEY FOR FRANCIS J. LOPEZ
L. Scott Keehn, ATTORNEY FOR ALAN STANLY

Disposition:

Motion denied without prejudice; Order to be prepared by Keehn.
Answer due 9/7

ASA 0012

TAB 20

CSD 1001C/103613
 Name, Address, Telephone No. & I.D. No.
 L. Scott Keehn (61691) 619-232-1700
ROBBINS & KEEHN, APC
 530 B Street, Suite 2400
 San Diego, CA 92101

Attorneys for **ALAN STANLY**



UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA
 325 West "F" Street, San Diego, California 92101-6991

In Re

Francis J. Lopez

Debtor.

LODGED

BANKRUPTCY NO. 05-05926-PB7

Date of Hearing: August 22, 2005

Time of Hearing: 2:30 p.m.

Name of Judge: Peter W. Bowie

**ORDER DENYING (WITHOUT PREJUDICE) ALLEGED DEBTOR'S MOTION TO DISMISS OR
 TRANSFER INVOLUNTARY PETITION TO THE NORTHERN DISTRICT OF FLORIDA**

IT IS ORDERED THAT the relief sought as set forth on the continuation pages attached and numbered two (2) through 2 with exhibits, if any, for a total of 2 pages, is granted. Notice of Lodgment Docket Entry No. 17

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DATED: **September 01, 2005**

Signature by the attorney constitutes a certification under Fed. R. of Bankr. P. 9011 that the relief in the order is the relief granted by the court.

Submitted by:

Robbins & Keehn, APC
 (Firm name)

By: /s/ L. Scott Keehn

Attorney for ☐ Movant ☒ Respondent


 Judge, United States Bankruptcy Court

ASA 0013

The Alleged Debtor's motion to dismiss or, in the alternative, transfer venue of the Involuntary Petition to the Northern District of Florida (the "Motions") came on regularly on August 22, 2005, at 2:30 p.m. in department 4 of the above entitled court located at 325 West "F" Street, San Diego, California, the Honorable Peter W. Bowie, Judge, presiding. Appearances were made by the firm of Robbins & Keehn, APC, by L. Scott Keehn on behalf of Alan Stanly, petitioning creditor in opposition to the motion, and Law Office of M. Jonathan Hayes, by M. Jonathan Hayes on behalf of the movant and Alleged Debtor, Francis J. Lopez.

The court having previously considered all of the pleadings, papers, requests for judicial notice, and declarations submitted by the parties in support of their respective positions, the oral arguments, contentions, and requests of the parties were fully heard and considered in open session.

The court's findings of fact and conclusions of law were stated orally by the court, and recorded in open session, following the close of argument, and are incorporated herein by this reference pursuant to Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing, and good cause therefore appearing,

IT IS HEREBY ORDERED that:

- (1) The Motions are denied without prejudice; and,
- (2) Alleged Debtor Francis J. Lopez is ordered to answer the petition on or before September 7, 2005.

ASA 0014

TAB 22

1 M. Jonathan Hayes (Bar No. 90388)
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Telephone: (818) 710-3656
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jhayes@polarisnet.net

FILED AC
05 SEP -7 AM 9:27
CLERK
U.S. BANKRUPTCY CT.
SO. DIST. OF CALIF.

5 Attorneys for Alleged Debtor Francis Lopez

6
7
8 **UNITED STATES BANKRUPTCY COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
10 **SAN DIEGO DIVISION**

11
12 In Re:

13 FRANCIS J. LOPEZ,
14 Alleged Debtor

CASE NO. 05-05926-PBINV

Involuntary Chapter 7

**ANSWER OF ALLEGED DEBTOR TO
INVOLUNTARY PETITION**

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23 COMES NOW the alleged debtor Francis J. Lopez ("alleged debtor" or "Lopez")
24 and answers the involuntary petition as follows:

25 1. Alleged debtor admits that the matters raised in the petition are a core
26 proceeding pursuant to 28 U.S.C. §157(b)(1) and (b)(2)(4).
27
28

1 2. Alleged debtor denies that he has been domiciled in this district for the 180
2 days preceding the filing of the involuntary petition. Alleged debtor admits that a
3 bankruptcy case concerning debtor's affiliate is pending in the district.

4 3. Alleged debtor denies that his debts are primarily business debts.

5 4. Alleged debtor has authority to answer the involuntary petition pursuant to
6 Federal Rules of Bankruptcy Procedure Rule 1011(a).

7 FIRST AFFIRMATIVE DEFENSE

8 5. Alleged debtor asserts that the court lacks subject matter jurisdiction on the
9 basis that the alleged debtor has more than 12 creditors and the petition was executed and
10 initiated by only one creditor. Pursuant to FRBP Rule 1003(b), a list of all of the alleged
11 debtor's creditors, addresses and a brief statement of the nature of their claims is attached
12 hereto and incorporated by reference as Exhibit A. Alleged debtor reserves the right to
13 supplement, add or amend the information contained in Exhibit A as further information is
14 obtained.

15 SECOND AFFIRMATIVE DEFENSE

16 6. Alleged debtor asserts that the court lacks subject matter jurisdiction on the
17 basis that the petitioning creditor is disqualified from bringing an involuntary petition
18 against this alleged debtor because the alleged debt that constitutes the basis of petitioning
19 creditor's claim is subject to a bona fide dispute.

20 THIRD AFFIRMATIVE DEFENSE

21 7. Alleged debtor alleges that the petition was filed in bad faith and for the
22 purpose of disrupting on-going litigation between the alleged debtor and the petitioning
23 creditor.

24 FOURTH AFFIRMATIVE DEFENSE

25 8. Alleged debtor asserts that the order for relief should not issue because the
26 alleged debtor was, as of the date of the petition, generally paying his debts as they became
27 due, unless those debts were subject to a bona fide dispute.

FIFTH AFFIRMATIVE DEFENSE

9. Alleged debtor asserts that the case should be transferred to Florida which is the proper venue.

PRESERVATION OF CLAIMS

10. Alleged debtor hereby reserves and shall not be deemed by this answer to have waived his rights to a cross claim or other relief pursuant to 11 U.S.C. §303(i)(1) and (2) and all subparts thereto, and as against petitioning creditors and/or those acting in conjunction with or counseling them.


WHEREFORE, alleged debtor prays:

1. That the court decline to enter any order for relief pursuant to 11 U.S.C. §303;
2. That the court dismiss the petition forthwith;
3. That the court thereafter permit the alleged debtor to seek compensation by counterclaim or other appropriate method for the entry of a judgment against petitioning creditor and other appropriate parties, pursuant to 11 U.S.C. §303(i); and
4. Such other relief as the court may deem proper.

Respectfully submitted,

LAW OFFICES OF M. JONATHAN HAYES

Dated: Sept 6, 2005

By: 
M. Jonathan Hayes, attorney for Francis J. Lopez

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Signature by the attorney constitutes a certification under Fed. R. Bankr. P. 9011
that the relief provided by the order is the relief granted by the court.

Submitted by:

By: 
M. Jonathan Hayes
Attorney for Francis J. Lopez

FRANCIS LOPEZ
EXHIBIT A
LIST OF CREDITORS

Progressive Insurance
PO Box 31260
Tampa, FL 33631
Acct. 37287380-4
\$157.20
Insurance, Auto

Coastal Community Insurance
12139 Panama City Beach Pkwy.
Panama City Beach, FL 32407
Policy No. LHQ336763
\$1,013.00
Insurance, Flood (Property)

Quicken Platinum Card
PO Box 44167
Jacksonville, FL 32231
\$848.00
Goods and services, 1998- 2005

Okaloosa Gas District
PO Box 548
Valparaiso, FL 32580
\$45.00
Utilities

Northwest Florida Daily News
200 Racetrack Rd.
Ft. Walton Beach, FL 32549
\$45.00
Newspaper

Kelly Plantation Owners Association
4393 Commons Drive E.
Destin, FL 32541
\$550.00
Homeowner's Association

Allstate Floridian
54 Beal Parkway
Ft. Walton Beach, FL 32548
\$1900.00
Homeowners Insurance

Texaco / Shell
PO Box 9151
Des Moines, IA 50368
Acct. No. 77-917-6550-1
\$290.00
Gasoline and related

Bank Of America
PO Box 1390
Norfolk, VA 23501
Acct. No. 4050860512429141
Credit Card, goods and services
\$2386.00

Verizon Wireless
PO Box 660108
Dallas, TX 75266
Acct. No. 81955380600001
\$45.00
Utility – telephone

Cox Communications
PO Box 60970
New Orleans, LA
Acct. No. 0018710003886502
Utility – television and Internet
\$112.00

Union Bank of California
8155 Mercury Ct.
San Diego, CA 92111
Settlement of Union Bank v. Francis Lopez, \$15,000 original balance
\$4,000.00

Bankcard Services
PO Box 15287
Wilmington, DE 19886
Acct. No. 5490999178488929
\$10,000.00
Goods and services – 2001- 2005

Cingular Wireless
PO Box 8229
Aurora, IL 60572
Acct. No. 0050443578
\$125.00
Utilities – telephone

Wayne Wise
810 Red Tanager Ct.
Nashville, TN 37221
\$15,000.00
Personal Loan

Valley Forge Life Insurance
100 CNA Drive
Nashville, TN 37214
Acct. No. VITU045825
\$0.00 (\$486.00 per year)
Life Insurance

American Home Shield
PO Box 849
Carroll, IA 51401
Acct. No. 58449061
\$128.00
Home appliance insurance

Citi Cards
PO Box 6414
The Lakes, NV 88901
Acct. No. 5424180306665024
\$32,515.00
Goods and Services, 1994 - 2005

Household Bank / HSBC
PO Box 5222
Carol Stream, IL 60197
Acct. No. 5176690006732635
Goods and Services, 2003 - 2005
\$5,000.00

American Express
PO Box 297804
Ft. Lauderdale, FL 33329
Acct. No. 378349802283007
\$22,000.00
Goods and Services, 1994 - 2004

Note: Some of this debt may be owed by Prism and/or Stanly, though I have personal guarantee

Ft. Walton Beach Medical Center
1000 Mar Walt Drive
Ft. Walton Beach, FL 32547
\$1600.00
Medical and Health services
Making payments of \$100.00 month

Alan Stanly
1569 Berkshire Ct.
San Marcos, CA 92069
\$50,000.00
Judgment in Union Bank v. Stanly (cross-complaint by Stanly)
Currently under appeal in CA

1
2
3 **PROOF OF SERVICE**

4 I, MJ Hayes, declare:

5 I am a resident of the State of California and over the age of eighteen years, and not
6 a party to the within action; my business address is 21800 Oxnard St., Suite 840,
7 Woodland Hills, CA 91367. On September 6, 2005, I served the within documents:

8 **ANSWER OF ALLEGED DEBTOR TO INVOLUNTARY PETITION**

9 by transmitting via facsimile the document(s) listed above to the fax
10 number(s) set forth below on this date before 5:00 p.m.

11 *ý* by placing the document(s) listed above in a sealed envelope with postage
12 thereon fully prepaid, in the United States mail at Los Angeles, California
13 addressed as set forth below.

14 .. by causing personal delivery by _____ of the document(s) listed
15 above to the person(s) at the address(es) set forth below.

16 .. by placing the document(s) listed above in a sealed _____
17 envelope and affixing a pre-paid air bill, and causing the envelope to be
18 delivered to a _____ agent for delivery

19 .. by personally delivering the document(s) listed above to the person(s) at the
20 address(es) set forth below.

21 L. Scott Keehn
22 Robbins & Keehn, APC
23 530 B Street, Suite 2400
24 San Diego, CA 92101

25 I am readily familiar with the firm's practice of collection and processing
26 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
27 Service on that same day with postage thereon fully prepaid in the ordinary course of
28 business. I am aware that on motion of the party served, service is presumed invalid if
postal cancellation date or postage meter date is more than one day after date of deposit for
mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at
whose direction the service was made.

Executed on September 6, 2005, at Los Angeles, California.

25
26 
27 MJ Hayes

TAB 23

ENTERED

FILED

SEP - 7 2005

FILED NO
CE SEP
UNITED STATES BANKRUPTCY COURTSOUTHERN DISTRICT OF CALIFORNIA
U.S. BANKRUPTCY CT.
SO. DIST OF CALIF.

JUDGE PETER W. BOWIE, PRESIDING

CLERK, US BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
DEPUTY

CERTIFIED COPY

IN THE MATTER OF:

NO. 05-05926-PB

FRANCIS J. LOPEZALLEGED DEBTOR'S MOTION TO DISMISS OR TRANSFER
INVOLUNTARY PETITION TO THE NORTHERN DISTRICT OF FLORIDAREPORTER'S TRANSCRIPT OF PROCEEDING

SAN DIEGO, CALIFORNIA

MONDAY, AUGUST 22, 2005

U.S. BANKRUPTCY COURT
DEPARTMENT THREE
325 WEST F STREET
SAN DIEGO, CA 92101BY COLLETTA JOHNSON, CSR, RPR
CSR NO. 12589
FEDERAL COURT REPORTERS
325 WEST F STREET
SAN DIEGO, CA 92101
(619) 474-3737

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APPEARANCES

FOR CREDITOR:

ROBBINS & KEEHN
BY: L. SCOTT KEEHN
530 B STREET, SUITE 2400
SAN DIEGO, CALIFORNIA 92101
(619) 232-1700

FOR DEBTOR:

LAW OFFICE OF M. JONATHAN HAYES
BY: M. JONATHAN HAYES
21800 OXNARD STREET, #840
WOODLAND HILLS, CALIFORNIA 91367
(818) 710-3656

1 SAN DIEGO, CALIFORNIA, MONDAY, AUGUST 22, 2005, 2:45 P.M.

2

3 MS. PEARSON: FRANCIS J. LOPEZ, ALLEGED DEBTOR'S
4 MOTION TO DISMISS OR TRANSFER INVOLUNTARY PETITION TO
5 THE NORTHERN DISTRICT OF FLORIDA.

6 MR. KEEHN: GOOD AFTERNOON, YOUR HONOR. SCOTT KEEHN
7 FROM THE FIRM OF ROBBINS & KEEHN APPEARING ON BEHALF OF
8 PETITIONING CREDITOR, ALAN STANLY, WHO IS PRESENT AND AT
9 COUNSEL TABLE.

10 THE COURT: OKAY.

11 MR. HAYES: GOOD AFTERNOON, YOUR HONOR. JONATHAN
12 HAYES, H-A-Y-E-S, FOR THE ALLEGED DEBTOR.

13 THE COURT: MR. HAYES, YOUR MOTION.

14 MR. HAYES: YOUR HONOR, THE MOTION ASKS THAT THE
15 INVOLUNTARY BANKRUPTCY BE DISMISSED AS A BAD FAITH
16 FILING AS A LITIGATION TACTIC, OR IN THE ALTERNATIVE,
17 ASK THE COURT TO ABSTAIN FROM HEARING THE INVOLUNTARY AT
18 ALL, OR IN THE ALTERNATIVE, ASK THAT THE CASE BE
19 TRANSFERRED TO FLORIDA BECAUSE THAT'S WHERE THE DEBTOR
20 LIVES. THAT'S WHERE HIS CREDITORS ARE. THAT'S WHERE
21 HIS FAMILY IS. THAT'S WHERE HIS PROPERTY IS.

22 I DON'T KNOW HOW MUCH THE COURT WANTS.

23 THE COURT: I'VE READ THE PAPERS.

24 MR. HAYES: RIGHT. I'M CERTAINLY WILLING AND READY
25 TO ANSWER ANY QUESTIONS THE COURT MAY HAVE.

1 THE COURT: I ASSUME YOU APPRECIATE THAT I CAN'T
2 RELY ON YOUR CLIENT'S CONCLUSORY ASSERTION THAT THERE
3 ARE MORE THAN 12 CREDITORS TO SIMPLY USE THAT AS A BASIS
4 FOR DISMISSAL; RIGHT?

5 MR. HAYES: YES. I ACCEPT THAT.

6 THE COURT: ALL RIGHT.

7 MR. HAYES: I BELIEVE THERE IS MORE THAN AMPLE
8 EVIDENCE THAT IT'S A LITIGATION TACTIC. THESE PARTIES
9 HAVE BEEN GOING AT IT FOR A FEW YEARS NOW. THIS IS A
10 BUSINESS DIVORCE. THERE IS LITIGATION PENDING NOW
11 BETWEEN THEM. AND THIS INVOLUNTARY WILL THROW THAT OFF
12 THE TRACK, BRINGING IN A TRUSTEE. IT JUST SEEMS TO BE
13 TRANSPARENT TO ME THAT THE PURPOSE OF THE BANKRUPTCY IS
14 NOT TO ALLOW MR. LOPEZ'S PROPERTY TO BE ADMINISTERED FOR
15 THE BENEFIT OF HIS CREDITORS.

16 THERE'S A COMMENT THAT -- WELL, I THINK THERE'S
17 FRAUDULENT CONVEYANCES, THAT IS SILLY FOR ONE THING, BUT
18 THERE'S NO EVIDENCE OF WHAT IT MIGHT BE; WHAT HE MIGHT
19 HAVE TRANSFERRED; WHERE IT MIGHT BE. THERE'S THESE
20 PROPERTIES THAT THESE CORPORATIONS THAT THE TESTIMONY --
21 THE STATEMENTS IN THE DECLARATIONS -- ARE CONSISTENT
22 WITH THE TESTIMONY IN THE DEBTOR'S EXAM. THEY'RE
23 DEFUNCT CORPORATIONS.

24 BUT IF THE COURT ISN'T WILLING TO JUST DISMISS
25 IT AS BEING IN BAD FAITH, THEN WE WOULD ASK THAT THE

1 CASE BE TRANSFERRED BACK TO FLORIDA AND MOVE THERE.
2 THAT'S WHERE HE LIVES NOW. IT'S BEEN MORE THAN TWO
3 YEARS. HE'S ONLY COME TO CALIFORNIA A COUPLE OF TIMES
4 SINCE. THAT'S, FRANKLY, INVOLVED WITH THESE LITIGATION
5 MATTERS. I PERSONALLY HAVE NEVER MET HIM. THIS IS THE
6 SECOND MATTER I'VE HANDLED FOR HIM. I KNOW HE
7 DOESN'T -- I SHOULD SAY --

8 THE COURT: DOES HE REALLY EXIST?

9 MR. HAYES: HE DOES. SOMEBODY WITH HIS NAME CALLED
10 ME THIS MORNING, AND I RECOGNIZED IT WAS THE SAME VOICE
11 AS I HAD HEARD BEFORE.

12 THE COURT: WHOEVER THAT IS; RIGHT?

13 MR. HAYES: THANK YOU.

14 I CAN ANSWER MORE QUESTIONS.

15 THE COURT: NO. GO AHEAD MR. KEEHN.

16 MR. KEEHN: THANK YOU, YOUR HONOR. FIRST, YOUR
17 HONOR, BEFORE I ADDRESS THE ISSUES, I WANT TO THANK BOTH
18 THE COURT AND COUNSEL FOR THE ACCOMMODATION IN
19 SCHEDULING. AND I THINK YOUR BROTHERS FORWARD OF
20 BROADWAY WILL THANK YOU AS WELL. WE WERE SUCCESSFUL IN
21 OUT ATTEMPTS TO SETTLE THAT MATTER.

22 BUT ADDRESSING THESE ISSUES, YOUR HONOR, AND I
23 THINK IT'S FAIRLY CLEAR ON THE RECORD NOW THAT WE'RE NOT
24 REALLY SUGGESTING, AS THE MOVING PAPERS INDICATED, THAT
25 THE MATTER BE DISMISSED FOR LESS THAN 12 CREDITORS. I

1 THINK EVERYONE UNDERSTANDS HOW THAT NEEDS TO BE PROVEN
2 UP.

3 AS FAR AS BAD FAITH LITIGATION TACTICS, YOUR
4 HONOR, I THINK A COUPLE OF THINGS THAT ARE IN THE RECORD
5 ARE INTERESTING TO NOTE.

6 FIRST, THERE WAS NO EVIDENTIARY OBJECTION TO OR
7 CONTROVERSY OVER THE FACTS EMBODIED IN MR. STANLY'S
8 DECLARATION, WHICH I THINK FAIRLY AND ADEQUATELY
9 ESTABLISHES BOTH FINDINGS AS FAR AS THIS CASE IS
10 CONCERNED. IF YOU SEARCH THE RECORD OF THIS CASE, THE
11 ONLY CREDITOR THAT IS DISCLOSED AS TO IDENTITY AND
12 AMOUNT OF THE CLAIM IS MR. STANLY. HIS CLAIM, AS THE
13 EVIDENCE SHOWS, IS A JUDGMENT CLAIM, PRINCIPAL AMOUNT OF
14 \$50,000. NOW, SOMEWHERE IN THE REPLY PAPERS, I BELIEVE,
15 THE CONTENTION IS ADVANCED THAT THIS IS SOMEHOW A
16 DISPUTED CLAIM. WELL, AS YOU CAN SEE FROM EXHIBIT 1 TO
17 THE STANLY DECLARATION, IT'S THE RESULT OF THE JUDGMENT.
18 AND THERE'S NO STAY OF THE EXECUTION.

19 SO EVEN IF THE MATTER IS ON APPEAL, I THINK FOR
20 PURPOSES OF DETERMINING WHETHER THIS IS A BONA FIDE
21 DISPUTE, AS THAT TERM IS USED BY THE *BANKRUPTCY CODE*, IT
22 DOESN'T EXIST.

23 SO HERE WE HAVE THE ONLY CREDITOR WE REALLY
24 KNOW ABOUT IN THE MATTER, WHO HAS A FIVE-FIGURE CLAIM
25 THAT CAN'T FAIRLY BE CHARACTERIZED AS THE SUBJECT OF

1 CONTROVERSY. WHO IS HERE. WHO'S CLAIM ORIGINATED HERE
2 IN THE COURTS OF CALIFORNIA. AND HE HAS FILED THE
3 BANKRUPTCY PETITION HERE FOR THE PURPOSE OF ATTEMPTING
4 TO COLLECT IT HERE. AND I WILL GET INTO THIS IN A
5 LITTLE MORE DETAIL, BUT WHEN IT COMES TO THE QUESTION OF
6 WHETHER WHEN AN ORDER FOR RELIEF IS ULTIMATELY ENTERED
7 IN THIS CASE, AND SOME TRUSTEE IS SADDLED WITH THE
8 CONSIDERABLE UNDERTAKING OF SIFTING THROUGH MR. LOPEZ'S
9 HISTORY OF TRANSACTIONS AND EVENTS, HE WILL BE LOOKING
10 TO WITNESSES THAT ARE HERE IN CALIFORNIA.

11 NOW, I THOUGHT IT INTERESTING THAT COUNSEL SAID
12 THAT THERE WAS SOME VAGUE REFERENCE TO FRAUDULENT
13 TRANSFER, BUT HE DIDN'T HAVE ANY IDEA WHAT THAT IS. I
14 FOUND THAT INTERESTING BECAUSE, AND I OFFERED THE PROOF
15 ON NOVEMBER 1ST OF 2004, MR. LOPEZ VERIFIED SUPPLEMENTAL
16 RESPONSES TO INTERROGATORIES IN THE STATE COURT ACTION
17 REFERRED TO AS *LOPEZ V. STANLY*. WHAT WAS INTERESTING IN
18 HIS RESPONSE, SUPPLEMENTAL RESPONSE TO INTERROGATORY
19 9.1, WHICH I DIDN'T HAVE THE TEXT OF IT IN FRONT OF ME,
20 SO I HAD TO PARAPHRASE HIS ANSWER, BUT HE'S SAYING --

21 THE COURT: IF IT WAS IN 9.1, IT MUST HAVE BEEN ONE
22 YOU WROTE; RIGHT?

23 MR. KEEHN: IT MAY HAVE BEEN ONE OF THE -- I BELIEVE
24 IT WAS THE COURT'S, YOUR HONOR. SO, NO, I CAN'T TAKE
25 CREDIT FOR THAT. I WOULD LIKE TO.

1 BUT IT ADDRESSES DAMAGES. AND HE CLAIMS
2 \$50,000 OF DAMAGES AGAINST MR. STANLY BECAUSE HE HAD TO
3 SELL HIS HOME FOR \$50,000 LESS THAN ITS FAIR MARKET
4 VALUE. SO WHAT WE HAVE IS A JUDICIAL OMISSION BY THIS
5 ALLEGED DEBTOR THAT HE HAS SOLD HIS PRIMARY ASSET, HIS
6 RESIDENCE, FOR AT LEAST \$50,000 -- THAT'S WHAT HE ADMITS
7 TO IT BEING -- UNDER THE MARKET. HE ALSO SAYS IN THIS
8 DECLARATION THAT HE'S BEEN A FLORIDA RESIDENT SINCE JULY
9 OF 2003. STILL THAT RESIDENCE OCCURRED SHORTLY BEFORE
10 MR. LOPEZ REMOVED HIMSELF TO FLORIDA.

11 NOW, THAT RAISES A REALLY INTERESTING PROBLEM
12 FOR WHATEVER TRUSTEE IS ULTIMATELY SADDLED WITH THE
13 BURDEN OF FIGURING OUT WHAT WAS WHAT WITH REGARD TO
14 MR. LOPEZ. AND THE REASON THAT IT'S SUCH AN INTRIGUING
15 QUESTION IS BECAUSE SECTION 308 OF THE NOW FAMOUS
16 *BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT*,
17 MAKES IMMEDIATELY EFFECTIVE ITS AMENDMENTS TO SECTION
18 522(O) .

19 NOW, THAT SECTION, THE COURT WILL RECALL,
20 PROVIDES A TEN-YEAR LOOK BACK FOR TRANSACTIONS,
21 BASICALLY, THAT RESULT IN DISPOSITIONS THAT MAY HAVE
22 BEEN MADE FOR THE PURPOSE OF HINDERING, DELAYING, OR
23 DEFRAUDING CREDITORS, AND NOW RESULTS IN A HOMESTEAD.

24 WELL, FLORIDA'S HOMESTEAD IS LEGENDARY UNDER
25 \$25,000. I CAN'T CITE YOU THE EXACT STATUTORY

1 PROVISION, BUT IF THE COURT WANTS IT, I CAN PROVIDE IT.
2 AND SO WE SEE THAT WITHIN A MONTH OF HIS ESTABLISHING
3 HIS RESIDENCE IN FLORIDA, MR. LOPEZ ADMITS TO SELLING
4 HIS HOMESTEAD HERE FOR LESS THAN FAIR VALUE AND ACQUIRES
5 A HOME IN FLORIDA WHERE HE CAN NOW CLAIM HIS \$125,000
6 EXEMPTION. NOW, WHAT THE AMENDMENT TO 522(O) PUTS INTO
7 THE HANDS OF THE TRUSTEE IS THE ABILITY TO SET ASIDE
8 \$50,000 WORTH OF THAT EXEMPTION.

9 AND WHERE WILL THE WITNESSES COME FROM IF THE
10 TRUSTEE CHOOSES TO LITIGATE THAT ISSUE? THEY'RE NOT IN
11 FLORIDA. THEY'RE ALL IN CALIFORNIA. THE REALTOR THAT
12 SOLD IT IS HERE IN CALIFORNIA. ANY OF THE PARTIES THAT
13 MADE OFFERS TO MR. LOPEZ ARE HERE IN CALIFORNIA. IN
14 OTHER WORDS, THE ONLY TRUSTEE THAT WOULD BE
15 DISADVANTAGED BY HAVING THE CASE MOVED TO FLORIDA IS THE
16 FLORIDA TRUSTEE.

17 AND I SUBMIT TO YOU THAT IF THIS CASE IS
18 TRANSFERRED TO FLORIDA, THAT TRUSTEE, BELEAGUERED AS HE
19 WILL BE WITH THIS CASE, IS MORE PROBABLY THAN NOT GOING
20 TO THROW UP HIS HANDS AND ABANDON ALL OF THESE POTENTIAL
21 CLAIMS. AND YOU WILL HAVE ISSUES THAT COULD RESULT IN
22 SIGNIFICANT CONTRIBUTIONS TO THE ESTATE GOING UNATTENDED
23 TO. WHY? BECAUSE THE WITNESSES AREN'T IN FLORIDA.

24 BUT WE'RE NOT LEFT WITH JUST THE HOMESTEAD.
25 BECAUSE THERE IS A GAGGLE OF WITNESSES THAT PERTAIN TO

1 AN ASSET, WHICH ACCORDING TO, ONCE AGAIN, MR. LOPEZ'S
2 NOVEMBER 1ST RESPONSE TO SUPPLEMENTAL RESPONSE TO
3 INTERROGATORY 9.1, SAYS THAT HE DOESN'T KNOW FOR SURE,
4 BUT HIS DAMAGES RANGE SOMEWHERE -- AGAIN, MR. STANLY --
5 RANGE SOMEWHERE BETWEEN \$800,000 AND A MILLION FIVE.

6 NOW, WHAT DAMAGES ARE THOSE? THOSE ARE DAMAGES
7 THAT HE HAS ALLEGED IN THE ACTION PENDING IN SUPERIOR
8 COURT, THE *LOPEZ V. STANLY* ACTION. EVERY WITNESS ON THE
9 WITNESS LIST IN THAT CASE, OTHER THAN MR. LOPEZ HIMSELF,
10 IS HERE IN CALIFORNIA. AND IF, IN FACT, HIS CLAIMS ARE
11 VALID, AND I WILL FOOTNOTE FOR THE RECORD THAT WE
12 CONTEND THAT THEY ARE NOT, AND I'VE REVIEWED THE MATTER
13 WITH TRIAL COUNSEL FOR THAT ACTION AND SHARE HIS
14 CONFIDENCE THAT MR. STANLY WILL BE VINDICATED, AND THAT
15 THE ACTUAL OBLIGATIONS WILL GO IN THE OTHER DIRECTION.
16 BUT TWO MOST VALUABLE POTENTIAL SOURCES IN A THEORETICAL
17 CONTEST FOR THIS ESTATE, THE LITIGATION ITEM AND THE
18 HOMESTEAD ITEM. WITNESSES HERE IN CALIFORNIA.

19 NOW, WE'RE NOT THROUGH YET BECAUSE I WILL
20 INDICATE TO THE COURT THAT AFTER REVIEWING THE REPLY, I
21 WENT BACK TO THE JUDGMENT DEBTOR'S EXAM, EXCERPTS OF
22 WHICH WERE INCLUDED IN OUR -- IN MR. STANLY'S --
23 DECLARATION, AND I WILL MAKE AS AN OFFER OF PROOF THAT
24 ON PAGES 49 TO 50 OF THAT EXAMINATION, MR. LOPEZ ADMITS
25 TO HAVING SOLD HIS ROLEX WATCH TO ONE OF HIS ATTORNEYS,

1 MR. FISCHBACH, FOR THE PRINCELY SUM OF \$2,500. NOW, I'M
2 NO EXPERT ON ROLEX WATCHES, BUT MY GUESS IS THAT ANY
3 TRUSTEE WORTH HIS SALT IS GOING TO WANT TO KNOW A LITTLE
4 BIT MORE ABOUT THAT TRANSACTION. MR. FISCHBACH IS HERE
5 IN CALIFORNIA.

6 AT PAGES 55 AND 56, I'LL REPRESENT TO THE COURT
7 AND MAKE AS AN OFFER OF PROOF, MR. LOPEZ ADDRESSES THE
8 ISSUE OF A JAPANESE SUIT OF ARMOR THAT HE WAS KNOWN TO
9 POSSESS. HE CLAIMS THAT HE SOLD IT IN 2003. WHEN ASKED
10 DID HE SELL IT IN FLORIDA, HE ANSWERED, "NO."

11 SO WE KNOW SINCE HE DIDN'T SELL IT FLORIDA, HE
12 MUST HAVE SOLD IT IN CALIFORNIA. AND HOW MUCH DID HE
13 SELL IT FOR? AGAIN, THE STAGGERING SUM OF \$1,500. I
14 DON'T KNOW FROM JAPANESE SUITS OF ARMOR, BUT MY GUESS IS
15 ANY TRUSTEE LOOKING AT THIS CASE IS GOING TO WANT TO
16 KNOW A LITTLE BIT MORE ABOUT HOW THAT PRICE WAS DERIVED
17 AND WHAT EVIDENCE OF VALUE THERE MAY BE.

18 I SUBMIT TO YOU THAT THOSE TRANSACTIONS, ALL OF
19 WHICH BY MR. LOPEZ'S ADMISSION, HERE IN THE STATE OF
20 CALIFORNIA WILL NOT BE -- FIND ANY ENLIGHTENMENT FROM
21 WITNESSES IN THE STATE OF FLORIDA.

22 SO THE QUESTION THEN BECOMES, AS WE HAVE
23 INDICATED IN OUR PAPERS, IN TERMS OF VENUE SELECTION, I
24 THINK ONE POINT IS VERY SIGNIFICANT TO MAKE AT THE
25 OUTSET. NO ONE ARGUES THAT THIS IS A TECHNICALLY

1 DEFECTIVE VENUE. THE PENDENCY OF THE PRESENT BANKRUPTCY
2 CASE, THAT OF THE AFFILIATE, CLEARLY ESTABLISHES
3 PROPRIETY OF VENUE HERE IN THE SOUTHERN DISTRICT.

4 HAVING FILED THE CASE AS A CREDITOR'S REMEDY,
5 AND SOMETIMES WE GET SO WRAPPED UP IN THE DEBTOR RELIEF
6 ASPECT OF THE BANKRUPTCY CASE, THAT WE FORGET THAT FROM
7 THE STATUTES OF ELIZABETH I FORWARD, BANKRUPTCY LAWS IN
8 ENGLAND AND THE UNITED STATES HAVE VERY STRONG ROOTS AS
9 A CREDITOR'S REMEDY. MR. STANLY IS A CREDITOR. HE
10 WOULD LIKE TO BE PAID. IF THAT'S BAD FAITH, IF THAT'S
11 WHAT'S EMBRACED WITHIN THE CONCEPT AS FAR AS MR. LOPEZ
12 SEES IT, THEN THIS IS IN BAD FAITH. BUT ALL HE'S DOING
13 IS EXERCISING WHAT AMOUNTS TO A CREDITOR'S REMEDY OF
14 LAST RESORT. THE CREDITOR'S REMEDY OF LAST RESORT ONLY
15 BECAUSE ALL OF THE CREDITORS THAT MR. LOPEZ HAS WILL
16 BENEFIT FROM THESE PROCEEDINGS IN THE EVENT THAT A COURT
17 ORDER FOR RELIEF IS ENTERED.

18 SO THE CASE LAW THAT WE HAVE CITED IN OUR
19 OPPOSING PAPERS, AND I DON'T THINK THERE'S ANY
20 ARGUMENT -- I SAW NO ARGUMENT TO THIS IN THE REPLY, NONE
21 AT ALL -- THAT ONCE YOU HAVE A CASE WHERE YOU CAN SAY
22 THAT THE VENUE IS PROPER, AS A MATTER OF LAW IT'S NOT
23 IMPROPER, THEN YOU LOOK TO THE CONVENIENCE OF THE
24 PARTIES AND THE WITNESSES.

25 NOW, WE ARE HERE TODAY, TWO PARTIES ARGUING IN

1 A CASE THAT WILL ENCOMPASS OTHER PARTIES WHO ARE
2 CREDITORS. WE'LL KNOW WHO THEY ARE WHEN MR. LOPEZ FILES
3 HIS SCHEDULES. AND THEY'RE ALL GOING TO BE BENEFITTED
4 BY THE ACTION HERE. I THINK THAT IT IS NOT THE
5 TRANSACTIONS, OCCURRENCES, AND EVENTS THAT MR. LOPEZ HAS
6 ENGAGED IN SINCE HE LEFT THIS JURISDICTION THAT WILL
7 EVER BE MUCH OF AN ISSUE. MUCH MORE OF AN ISSUE WILL BE
8 THE TRANSACTIONS, OCCURRENCES, AND EVENTS THAT OCCURRED
9 IN THE TEN-YEAR PERIOD 19 -- EXCUSE ME -- FROM 1995 TO
10 2003 PERIOD WHEN HE WAS DOING BUSINESS HERE IN THE
11 SOUTHERN DISTRICT OF CALIFORNIA. THOSE ARE THE
12 TRANSACTIONS AND EVENTS THAT ARE GOING TO BE RELEVANT.

13 AND TWO OF THE CASES THAT HAVE CLOSE PARALLEL
14 TO OUR SITUATION HERE, THE *WAXELBAUM* CASE AND *KONA JOINT*
15 *VENTURES* CASE -- EXCUSE ME. THE BANKRUPTCY COURT FROM
16 HAWAII, AT LEAST WITHIN THE NINTH DISTRICT, POINTS OUT
17 THAT'S REALLY THE KEY. WHERE ARE THOSE WITNESSES GOING
18 TO BE? I HAVEN'T SEEN ANY EVIDENCE IN THE FORM OF A
19 DECLARATION. AND I HAVEN'T HEARD ANY ARGUMENT THAT IT
20 ISN'T ENTIRELY CONCLUSIONARY. AND THAT INDICATES THAT
21 THE CONVENIENCE OF THE PARTIES, OR IN THIS CASE, THE
22 VERY PURPOSE FOR WHICH INVOLUNTARY PROCEEDING HAS BEEN
23 INITIATED. AND THAT IS TO PUT OUR ARMS AROUND WHATEVER
24 ASSETS MR. LOPEZ HAS AT THE MOMENT, AND SEE TO IT THAT
25 THEY ARE FULLY AND FAIRLY ADMINISTERED IN ACCORDANCE

1 WITH THE BANKRUPTCY LAWS OF THE UNITED STATES.

2 NOW, IN HIS DECLARATION, HIS REPLY DECLARATION,
3 MR. LOPEZ INDICATES, FOR EXAMPLE, THAT HIS INTEREST IN
4 CAMBRIA HOLDINGS HAS NO VALUE. IT'S DEFUNCT. HE SAYS,
5 "IT HOLDS NO ASSETS."

6 HE DOESN'T SAY, I THINK THEY HOLD NO ASSETS.
7 HE SAYS, "NO ASSETS."

8 WE ARE GOING TO PROVE, AND I'VE CONFIRMED
9 THROUGH THAT ENTITY'S CPA, TAX RETURNS HAVE BEEN FILED
10 THAT SHOW ASSETS IN THAT ENTITY. HIS INTEREST IN THAT
11 ENTITY IS AN ASSET THAT CAN BE SOLD. HIS INTEREST IN
12 PRISM, WHICH AT FIRST BLUSH, ONE COULD HAVE SOME
13 SYMPATHY FOR HIS CONTENTION THAT PRISM IS A CHAPTER 7
14 DEBTOR ITSELF; AND, THEREFORE, IT HAS NO VALUE.

15 I WOULD OFFER TO PROVE, YOUR HONOR, THAT
16 MR. STANLY HIMSELF, THE OTHER 50 PERCENT SHAREHOLDER,
17 HAS AN INTEREST IN PURCHASING THE REMAINING 50 PERCENT.
18 I THINK THE RECORD THAT WE PROVIDED IN CONNECTION WITH
19 MR. STANLY'S DECLARATION, THE FINDINGS OF FACT WHERE HE
20 PURCHASED ASSETS OUT OF PRISM, CORROBORATED HIS
21 CONTENTION THAT HE HAS AN INTEREST IN ACQUIRING THAT
22 ENTITY. THAT ENTITY, I'M TOLD, HAS LOST CARRYFORWARD
23 ATTRIBUTES THAT WOULD BE USEFUL IN THE HANDS OF A SOLE
24 SHARE. MR. STANLY IS A CANDIDATE FOR THAT. AND HE HAS
25 DEMONSTRATED IN THE PAST HIS WILLINGNESS AND ABILITY TO

1 PAY FOR THINGS OUT OF BANKRUPTCY, WHICH GOES TO THE
2 BENEFIT OF ALL CREDITORS. AND SO THAT, TOO, IS A REASON
3 FOR MAINTAINING THE ACTION HERE IN PARALLEL WITH THE
4 *PRISM* ACTION.

5 AND, OF COURSE, AS INDICATED IN OUR OPPOSING
6 PAPERS, IT'S ENTIRELY POSSIBLE THAT THERE WILL BE
7 FURTHER ACTIONS IN THE *PRISM* CASE INITIATED BY
8 MR. STANLY TO COMPEL THE COMPLIANCE WITH ORDERS MADE BY
9 JUDGE MEYERS IN CONNECTION WITH THE SALE OF ASSETS TO
10 HIM.

11 AS RECENTLY AS LAST WEEK, MR. LOPEZ FILED
12 SUBSTANTIAL DECLARATIONS AND OTHER OPPOSITION IN THE
13 *LOPEZ V. MARTIN* CASE. HE SEES VALUE THERE. I SUBMIT TO
14 YOU THAT WHEN AN ORDER FOR RELIEF IS ENTERED, A TRUSTEE
15 SHOULD LOOK AT THAT CASE. AND HE CAN'T DO THAT
16 EFFECTIVELY FROM FLORIDA.

17 I THINK, IN SUM, OTHER THAN JUST A
18 CONCLUSIONARY ALLEGATION THAT THIS IS A LITIGATION
19 TACTIC, THERE'S NO EVIDENCE THAT SUPPORTS THAT CHARGE.

20 NOW, I UNDERSTAND THE HEAT THAT'S GENERATED BY
21 LITIGATION. I ALSO UNDERSTAND THE PROPENSITY OF A
22 WITNESS WHO IS A PARTY TO THAT LITIGATION CAUGHT UP IN
23 ALL OF ITS NUANCES. HE TENDS TO VIEW HIS ADVERSARY WITH
24 GREAT SUSPICION. AND SO IT DOESN'T SURPRISE ME THAT THE
25 KNEE-JERK ACTION OF MR. LOPEZ TO THIS EXERCISE OF THE

1 CREDITORS' REMEDY IS: WELL, THIS MUST BE ANOTHER BAD
2 FAITH TACTIC.

3 WELL, YOU HEARD FROM COUNSEL DURING HIS
4 PRESENTATION. YOU HEARD HIM SAY THAT WE'RE TRYING TO
5 "DERAIL THAT LITIGATION." AND I THINK THAT WE HAVE
6 SUBMITTED IN OPPOSITION SUBSTANTIAL EVIDENCE TO COUNTER
7 THAT NOTION. THERE WAS THE CORRESPONDENCE BOTH FROM OUR
8 OFFICE AND FROM MR. DILLON'S OFFICE, THE STATE COURT
9 COUNSEL, THAT WERE APPENDED TO MR. STANLY'S DECLARATION.

10 AND THEY ESTABLISHED TWO THINGS. THAT, NUMBER
11 ONE, MR. STANLY IS PREPARED TO STIPULATE THAT THOSE
12 MATTERS CAN GO FORWARD SO THAT THERE WOULDN'T BE A
13 DELAY. THE REQUEST FOR THAT STIPULATION WAS REBUFFED.

14 MR. STANLY ALSO HAD OFFERED -- TRIED -- TO GET
15 AN AGREEMENT AMONG COUNSEL TO CONCEDE THAT WHICH THE
16 CASE LAW PROVIDES. AND THAT IS THAT A DEFENDANT IN AN
17 ACTION WHERE THE TITLE 11 DEBTOR IS THE PLAINTIFF, IS
18 NOT PRECLUDED BY THE AUTOMATIC STAY FROM THE DEFENSIVE
19 ACTION OF A SUMMARY JUDGMENT MOTION AGAINST THE
20 PLAINTIFF'S CASE. AND, OF COURSE, THAT'S THE REASON
21 THAT THAT ISSUE WAS PUT BEFORE JUDGE MOOREFIELD, I
22 BELIEVE IT IS, IN THE STATE COURT, WHO CONCURRED WITH
23 THE AUTHORITIES THAT WERE PRESENTED. AND THAT'S WHY THE
24 SUMMARY MOTION JUDGMENT AGAINST THE DEBTOR'S ACTION IS
25 PROCEEDING TO HEARING SOMETIME MID-SEPTEMBER.

1 BUT MR. STANLY HAS NEVER DONE ANYTHING TO
2 "DERAIL THAT LITIGATION." AND HE DOESN'T INTEND TO.
3 HE'S PERFECTLY HAPPY TO PROCEED AT A PACE WITH THE
4 TRIAL. AND IN THAT CASE, THE TRUSTEE HERE OR FLORIDA OR
5 ANYWHERE WILL BE HANDED AN ADJUDICATION AS TO WHAT THAT
6 ASSET, IF IT EXISTS, IS. SO THERE'S NO INTENTION TO
7 DELAY THAT'S SUPPORTED BY THE EVIDENCE.

8 THERE'S NO EVIDENCE THAT SUPPORTS A FINDING OF
9 BAD FAITH. WHAT MR. STANLY HAS DONE IS HE HAS ACTED
10 QUICKLY TO ENFORCE HIS CREDITOR'S RIGHTS, AS HE SEES
11 THEM, BEFORE HIS FEARS THAT MR. LOPEZ MAY SEEK READ
12 ASSETS OR OTHERWISE PUT THEM BEYOND THE REACH OF HIS
13 CREDITORS OR HIS TRUSTEE CAN COME TO FRUITION. AND,
14 TOO, BROUGHT THIS MATTER BEFORE THE COURT AS PROMPTLY AS
15 HE COULD IN THE HOPES THAT AS FEW AS POSSIBLE OF THE
16 POTENTIALLY AVOIDABLE TRANSACTIONS THAT MR. LOPEZ HAS
17 WOULD RIPEN TO A POINT WHERE THEY WERE BEYOND THE
18 STATUTES OF LIMITATION. THE OTHER SIDE OF A CREDITOR'S
19 REMEDY IS NOT BAD FAITH. THERE IS NO, ABSOLUTELY NO,
20 EVIDENCE OF BAD FAITH.

21 AND ONE FINAL OFFER OF PROOF. AND I MAKE THIS
22 AS AN OFFER OF PROOF BECAUSE I'VE ONLY SEEN THE
23 CONFIRMING FACTS FROM THE ALTERNATIVE RESOLUTION
24 COMPANY, I BELIEVE IT IS, THE ENTITY THAT EMPLOYED THE
25 PRIVATE MEDIATOR, THAT VERIFIED THAT THEY ARE STILL OWED

1 IN THE NEIGHBORHOOD OF \$1,500. SO THERE'S ANOTHER
2 CALIFORNIA CREDITOR TO BE BENEFITED. CALIFORNIA
3 CREDITORS ARE THE ONLY ONES WE KNOW BY NAME. MR. STANLY
4 IS LIKELY TO BE THE LARGEST IN THE CASE. AND I THINK
5 HIS FORUM SELECTION, UNDER THE CONTROLLING PRINCIPALS,
6 HAS TO BE GIVEN DEFERENCE.

7 AND THERE IS ABSOLUTELY NO EVIDENCE, NONE, THAT
8 SUPPORTS THE NOTION THAT THE CREDITORS OF THIS ESTATE,
9 IF AN ESTATE IS CREATED BY ORDER OF RELIEF, WILL BENEFIT
10 BY A TRANSFER TO FLORIDA. MR. LOPEZ WILL BE THE SOLE
11 BENEFICIARY OF THAT WINDFALL.

12 THE COURT: MR. HAYES.

13 MR. HAYES: THANK YOU, YOUR HONOR.

14 FIRST OF ALL, I'D LIKE TO OBJECT TO THE BULK OF
15 MR. KEEHN'S TESTIMONY UP HERE. VERIFIED INTERROGATORIES
16 9.1, I HAVEN'T SEEN THAT. IT ISN'T IN ANY OF THE
17 PAPERS. THERE WAS TESTIMONY ABOUT HIS HOME BEING SOLD
18 BEFORE FILING. I DIDN'T KNOW THAT. IT WAS NOT IN THE
19 PAPERS. I DIDN'T ASK. I DIDN'T KNOW THAT THERE'S THIS
20 ROLEX WATCH SOLD FOR \$2,000. AND THAT'S MR. KEEHN'S
21 GUESS THAT IT'S WORTH MORE THAN THAT. THERE'S TAX
22 RETURNS FROM HIS CPA FOR -- I DIDN'T GET THE NAME OF THE
23 COMPANY -- BUT OTHER SUBSTANTIAL DECLARATIONS FILED
24 RECENTLY.

25 BUT WHAT WAS REALLY INTERESTING TO ME IS THAT

1 THEY DID TAKE MR. LOPEZ'S DEBTOR'S EXAM IN FLORIDA.
2 THEY ATTACHED A COUPLE PAGES OF IT TO THE MOTION -- TO
3 THE OPPOSITION. PRESUMABLY, ALL OF THAT WOULD HAVE BEEN
4 IN THERE. DID YOU SELL YOUR HOUSE? HOW MUCH DID YOU
5 GET FOR IT? HOW MUCH DID YOU SELL IT FOR, THE AMOUNT?
6 DID YOU SELL ANYTHING ELSE IN THE LAST YEAR? HAVE YOU
7 SOLD ANYTHING IN FIVE YEARS? PRESUMABLY, THEY WOULD
8 HAVE ASKED THAT, AND IT WOULD HAVE BEEN IN THE DEBTOR'S
9 EXAM. THEY WOULD HAVE HAD SOMETHING TO ATTACH.
10 MR. KEEHN'S SAID THIS IS A HISTORY OF TRANSACTIONS AND
11 EVENTS. WHY ISN'T IT IN THERE? AND I'LL OBJECT AND ASK
12 THAT THE COURT STRIKE ALL OF THAT TESTIMONY.

13 BUT GETTING BEYOND THE OBJECTION, I THINK
14 MR. KEEHN SAID THAT MR. LOPEZ IS ALLEGING MILLIONS OF
15 DOLLARS, OR, I GUESS, \$1,800,000 IN DAMAGES IN THIS
16 LITIGATION. ACTUALLY, I DIDN'T REALIZE THAT. I HAVEN'T
17 BEEN INVOLVED IN THE LITIGATION.

18 BUT, I MEAN, IT JUST POPPED OUT AT ME AS SO
19 OBVIOUS, THE MOTIVATION AT THIS POINT. HE'S BEING SUED
20 FOR A MILLION DOLLARS. IF THERE'S A CHAPTER 7, HE'LL
21 HAVE SOMEBODY TO NEGOTIATE WITH AND TO GET THAT TO GO
22 AWAY FOR, HOPEFULLY, SOME -- YOU KNOW, THERE WILL BE A
23 NEW FACE ON WHO'S AFTER HIM. IT WILL BE THE TRUSTEE.
24 THAT SHOWS THAT IT IS LITIGATION STRATEGY.

25 THE SECTION 522(O), AND THAT WORKS NO MATTER

1 WHAT STATE THE BANKRUPTCY IS IN, IF THERE'S AN OBJECTION
2 TO THE HOMESTEAD EXEMPTION ON THE HOME THAT HE OWNS IN
3 FLORIDA, THAT APPLIES NO MATTER WHICH STATE THE
4 BANKRUPTCY IS IN. IT'S IRRELEVANT TO HOW THE HOMESTEAD
5 WORKS, AT LEAST, UNDER SECTION 522(O).

6 BUT I WOULD LIKE TO MAKE ONE LAST COMMENT. I
7 DIDN'T FILE AN EVIDENTIARY OBJECTION TO MR. STANLY'S
8 DECLARATION. 60 PERCENT OF IT, AT LEAST, IS ARGUMENTS,
9 AND IT'S COMPLETELY OBJECTIONABLE, BUT I'M TRYING TO
10 FOCUS JUST ON THE INCREDIBLE UNFAIRNESS TO AN INDIVIDUAL
11 LIVING IN FLORIDA WITH HIS FAMILY HAVING TO GET STUCK
12 WITH GOING THROUGH A BANKRUPTCY IN CALIFORNIA. I'M
13 REALLY TRYING TO KEEP HIS COSTS DOWN. THAT'S WHY I
14 LIMITED THE MOTION TO WHAT IT IS. AND I DIDN'T FILE AN
15 EVIDENTIARY OBJECTION.

16 BUT DOES THE COURT HAVE ANY QUESTIONS OF ME?

17 THE COURT: NOPE.

18 MR. HAYES: THANK YOU.

19 THE COURT: ALL RIGHT. WELL, I'LL TELL YOU MY VIEW.
20 FIRST OFF, IT'S 1412 OF TITLE 28 THAT GOVERNS TRANSFER
21 OF CASES UNDER TITLE 11 AS DISTINCT FROM TRADITIONAL
22 CIVIL CASES, WHICH IS 1404. AND IT DOESN'T INCLUDE
23 CONVENIENCE OF WITNESSES AS ONE OF THE GROUNDS
24 INTERESTINGLY. IT'S NOT AS BROAD AS 1404(A) IS.
25 INDEED, THERE'S A BRAND NEW CASE OUT OF THE NINTH

1 CIRCUIT THAT HAS JUST COME DOWN THAT DISCUSSES IT
2 SOMEWHAT.

3 I'M SATISFIED THAT ON THE PRESENT RECORD, THERE
4 IS NO BASIS FOR DISMISSAL OF THIS INVOLUNTARY PETITION.
5 THAT'S FIRST.

6 SECONDLY, THE REQUEST HAS BEEN MADE THAT I
7 ABSTAIN. BUT THERE IS NOTHING FOR ME TO ABSTAIN IN
8 FAVOR OF. ABSTENTION WORKS IF THERE WERE AN ADVERSARY
9 PROCEEDING PENDING AS PART OF THIS, AND THERE WAS
10 ALREADY A PROCEEDING PENDING SOMEWHERE ELSE THAT COULD
11 GET THROUGH IT EXPEDITIOUSLY AND RESOLVE THAT QUESTION.
12 THERE IS NO OTHER PLACE THAT HAS JURISDICTION.

13 SO WE'RE REALLY ONLY TALKING ABOUT TRANSFERRING
14 VENUE IN THIS CONTEST. AND I'M NOT PREPARED ON THIS
15 RECORD TO SAY THERE'S A BASIS FOR DOING SO. BUT I LEAVE
16 IT OPEN FOR US TO CONSIDER.

17 IT SEEMS TO ME THAT IF MR. LOPEZ WANTS TO FIND
18 OUT WHETHER THERE'S ANYTHING HERE, STEP ONE MAY BE TO
19 AGREE TO ENTRY OF AN ORDER FOR RELIEF. WE GET A CHAPTER
20 7 TRUSTEE IN THERE, AND THEN WE FIND OUT.

21 ONE OF YOUR CONCERNS, MR. HAYES, IS THIS NOTION
22 THAT THE TRUSTEE CAN NEGOTIATE FOR THE VALUE OF
23 MR. LOPEZ'S CAUSE OF ACTION AGAINST MR. STANLY, AND THAT
24 MR. STANLY MAY BE ABLE TO BUY HIS PEACE THROUGH THE
25 TRUSTEE. IF, IN FACT, THE ONLY LIABILITIES THAT

1 MR. LOPEZ HAS ARE THIS \$50,000 OWED ON THE STANLY
2 JUDGMENT, AND A FEW OTHER THINGS, THEN MR. LOPEZ WOULD
3 BE RECOGNIZED AS HAVING AN INTEREST, BECAUSE IN THEORY
4 IT COULD BE A SOLVENT ESTATE IN DISCUSSING WHAT COULD
5 HAPPEN TO THAT CAUSE OF ACTION. NOTE THAT THERE IS SOME
6 RESIDUAL BORNE IN THAT CONTEXT BECAUSE HE WOULD HAVE AN
7 INTEREST IN THAT CIRCUMSTANCE. IT'S ONLY WHEN WHATEVER
8 THE TRUSTEE CAN GET FOR IT IS GOING TO BE LESS THAN
9 WHAT'S OWED BY THE ESTATE THAT THE DEBTOR ENDS UP HAVING
10 NO INTEREST AND IS UNABLE TO PARTICIPATE IN THAT PROCESS
11 IN ANY KIND OF MEANINGFUL WAY. BUT GIVEN THOSE KINDS OF
12 NUMBERS AND SO ON, AND GIVEN THE DEBTOR'S THEORY OF WHAT
13 IT MAY BE WORTH, THERE MAY WELL BE SOMETHING THERE THAT
14 WOULD BE RESIDUAL. AND SO THE DEBTOR IS NOT CLOSED OUT
15 FROM JUST PARTICIPATING IN THAT PROCESS IF, IN FACT,
16 THAT IS SOMETHING THAT OCCURRED. I HAVE NO IDEA WHETHER
17 THAT WILL OCCUR.

18 SO AT THIS POINT IN TIME, THE MOTION TO CHANGE
19 VENUE WILL BE DENIED, AS WILL THE MOTION TO DISMISS, AND
20 ABSTAIN. BUT THAT WILL BE WITHOUT PREJUDICE. AND WE'LL
21 TAKE ANOTHER LOOK AT IT. IF, IN FACT, WE WIND UP IN A
22 FEW -- IN A SHORT PERIOD OF TIME IN A MONTH OR TWO, THE
23 TRUSTEE SAYS THERE'S NOTHING HERE THAT I WANT TO PURSUE
24 AND FILES A REPORT OF NO DISTRIBUTION, THAT WE MAY
25 EITHER -- YOUR CLIENT MAY EITHER HAVE A DISCHARGE OR

1 WILL HAVE A BASIS FOR TRANSFER BECAUSE OF THE THINGS
2 THAT MR. KEEHN HAS PARADED AS BEING POSSIBLE BASES FOR
3 RECOVERY FOR THE BENEFIT OF CREDITORS BY A TRUSTEE,
4 TRUSTEE IS DETERMINED NOT TO PURSUE FOR WHATEVER REASON.

5 MR. HAYES: I HAVE A RIGHT TO FILE AN ANSWER; RIGHT?

6 THE COURT: OH, ABSOLUTELY. SURE.

7 MR. HAYES: AND A TRUSTEE ISN'T GOING TO BE
8 APPOINTED UNLESS THERE'S A MOTION.

9 THE COURT: NO. THERE'S GOING TO BE -- WELL, NO,
10 ONCE THERE'S AN ORDER FOR RELIEF IN A 7, A TRUSTEE WILL
11 BE APPOINTED.

12 MR. HAYES: ABSOLUTELY. BUT YOU'RE NOT ENTERING AN
13 ORDER.

14 THE COURT: NO. YOU GET TO FILE AN ANSWER AND
15 CONTEST IT. BUT, YOU KNOW, IF YOU FILE AN ANSWER AND
16 CONTEST IT, THEN THERE WILL BE DISCOVERIES AS TO THE
17 FACTS ON WHICH YOU PREDICATE YOUR ANSWERS.

18 MR. KEEHN: YOUR HONOR, JUST A POINT OF
19 CLARIFICATION, I UNDERSTAND CRYSTAL CLEAR THE DENIAL OF
20 THE VENUE MOTION IS WITHOUT PREJUDICE. BUT THAT WITHOUT
21 PREJUDICE TAG DOESN'T GO TO THE OTHER TWO MOTIONS.

22 THE COURT: WELL, AS TO ABSTAIN, THERE'S NOTHING TO
23 ABSTAIN IN FAVOR OF. AND AS TO THE MOTION TO DISMISS ON
24 THE GROUNDS THAT IT'S BAD FAITH AT THIS POINT IN TIME --
25 I MEAN, IF SUBSEQUENTLY SOMETHING TURNS UP THAT

1 PERSUADES ME THAT IT IS, I'D EXPECT TO HEAR ABOUT IT
2 FROM MR. HAYES.

3 MR. HAYES: WELL, WOULD THE COURT GIVE ME A DEADLINE
4 TO FILE AN ANSWER? I MEAN, I DON'T THINK THERE'S A
5 STATUTORY DEADLINE.

6 MR. KEEHN: YOUR HONOR, IF THEY FILED FROM THE TIME
7 THE SUMMONS WAS SERVED, THEY GET 30 DAYS. THEY HAVE NOW
8 KNOWN ABOUT IT FOR A COUPLE OF MONTHS. I WOULD THINK
9 IT'S FAIR IF AN ANSWER WAS FILED 15 DAYS FROM TODAY'S
10 DATE.

11 MR. HAYES: OKAY.

12 THE COURT: IS 15 DAYS COMFORTABLE WITH YOU?

13 MR. HAYES: YES.

14 THE COURT: OKAY. THAT WOULD MAKE IT THE 6TH OF
15 SEPTEMBER, WHICH IS A TUESDAY, THE FIRST DAY AFTER LABOR
16 DAY.

17 MR. HAYES: YOUR HONOR, COULD YOU MAKE IT THE 7TH?

18 THE COURT: SURE. I HATE DEADLINES THAT FALL AFTER
19 THREE-DAY WEEKENDS MYSELF. AND I HAVE NO PROBLEM WITH
20 THAT ACCOMMODATION.

21 MR. HAYES: I HAVE TO MAIL IT, SO IT WOULD BE --
22 ANYWAY, THE 7TH IS GREAT.

23 THE COURT: OKAY.

24 MR. HAYES: THANK YOU.

25 THE COURT: WE'LL SEE YOU ANON.

1 MR. HAYES: MR. KEEHN WILL SUBMIT AN ORDER?

2 MR. KEEHN: YES. I WILL. I DO HAVE A PROPOSED FORM
3 OF ORDER.

4 MR. HAYES: THANK YOU, YOUR HONOR.

5 MR. KEEHN: THANK YOU, YOUR HONOR.

6 THE COURT: ALL RIGHT. WE'LL BE IN RECESS.

7 (PROCEEDINGS CONCLUDED AT 3:20 P.M.)

8 -000-

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1
2 STATE OF CALIFORNIA

3 COUNTY OF SAN DIEGO
4

5 I, COLLETTA JOHNSON, HEREBY CERTIFY:
6

7 THAT I REPORTED IN SHORTHAND THE PROCEEDINGS HELD IN THE
8 FOREGOING CAUSE ON THE 22ND DAY OF AUGUST, 2005;

9 THAT MY NOTES WERE LATER TRANSCRIBED INTO TYPEWRITING
10 UNDER MY DIRECTION AND THAT THE FOREGOING 25 PAGES
11 CONTAIN A CORRECT STATEMENT OF THE PROCEEDINGS.
12

13 DATED THIS 5TH DAY OF SEPTEMBER, 2005.
14

15 
16

17 COLLETTA JOHNSON
18 CSR NO. 12589
19
20
21
22
23
24
25

TAB 27

1 M. Jonathan Hayes (Bar No. 90388)
 2 Law Office of M. Jonathan Hayes
 21800 Oxnard St, Suite 840
 Woodland Hills, CA 91367
 Telephone: (818) 710-3656
 Facsimile: (818) 710-3659
 4 jhayes@polarisnet.net

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NOV 22 2005
CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY

5 Attorneys for Alleged Debtor Francis Lopez

6
7
8 **UNITED STATES BANKRUPTCY COURT**
 9 **SOUTHERN DISTRICT OF CALIFORNIA**
 10 **SAN DIEGO DIVISION**

12 In Re:

13 FRANCIS J. LOPEZ,
 14 Alleged Debtor

CASE NO. 05-05926-PBINV

Involuntary Chapter 7

**MOTION BY ALLEGED DEBTOR
 FOR AN ORDER BIFURCATING
 TRIAL RE INVOLUNTARY
 PETITION; SETTING A DEADLINE
 TO ADD NEW PETITIONING
 CREDITORS; AND REQUIRING THE
 POSTING OF A BOND;
 DECLARATION OF FRANCIS J.
 LOPEZ**

Date: December 19, 2005
 Time: 10:00 a.m.
 Ctrm: 4

23 TO THE HONORABLE PETER W. BOWIE, UNITED STATES BANKRUPTCY
 24 JUDGE, TO PETITIONING CREDITOR ALAN STANLY AND ALL INTERESTED
 25 PARTIES:
 26
 27
 28

I.

STATEMENT OF FACTS

Francis J. Lopez and the single petitioning creditor Alan Stanly have been involved in significant litigation against each other since before the bankruptcy filing of their entity Prism Advanced Technologies, Inc. ("Prism"). This litigation has been bitterly fought for the past two years and is now pending in Superior Court between the parties, namely Lopez v Stanly, Case No. GIN029692, filed on May 14, 2003, San Diego Superior Court, North County. In that matter, Mr. Lopez has alleged numerous causes of action against Mr. Stanly including invasion of privacy, breach of fiduciary duty, trespass and identity theft. Mr. Stanly filed a cross-complaint, of course. Recently, in a second case, Mr. Stanly was successful in obtaining a judgment against Mr. Lopez for approximately \$50,000 relating to a guarantee both had made to Union Bank of a Prism loan. Recently, in a third case, Mr. Stanly has sued Mrs. Lopez claiming that she "removed property" causing \$2,000 in storage costs. It requests \$2,000 in damages and "compensatory" and punitive damages of "more than \$10,000 up to \$25,000." Mrs. Lopez has had to retain counsel to defend herself.

This involuntary chapter 7 petition is simply an extension of the litigation and a new strategy by Mr. Stanly to cause as much business and personal pain to Mr. Lopez as possible. On August 11, 2005, Mr. Lopez learned that two of his credit cards have been cancelled because the issuer thinks that he filed this bankruptcy himself. The long term costs in terms of increased interest on loans are obvious.

In any event, Mr. Lopez has well more than 12 creditors as Mr. Stanly knows very well. He knows this very well because he conducted a debtor's examination on Mr. Lopez in Florida on May 9, 2005. The examination transcript covers 65 pages of testimony by Mr. Lopez. Mr. Lopez was asked at length about his creditors and the numbers and total amount owed. Despite Mr. Stanly's personal participation in the examination by

1 telephone, he nevertheless stated in his declaration in this case that he was only aware that
2 the alleged debtor had three creditors, which he claimed were all in California.

3 This Involuntary Petition was filed June 30, 2005 with Mr. Stanly as the only
4 petitioning creditor. The Answer specifically identified 22 creditors. That list is attached
5 hereto as Exhibit A. On or about October 3, 2005, Mr. Stanly served 12 of the creditors
6 with a subpoena seeking documents on November 1, 2005. At the Status Conference on
7 October 12, 2005, Stanly's counsel advised the court that discovery was sitting on his desk
8 to be served that week. As of November 16, 2005, no such discovery has been served and
9 in fact nothing at all has taken place.

10 No new creditors have joined as petitioning creditors. Therefore this case will be
11 dismissed at trial which should be held at the earliest possible time.

12 II.

13 TRIAL SHOULD BE BIFURCATED SO THAT THE ISSUE OF 14 NUMBER OF CREDITORS MAY BE DETERMINED QUICKLY AND A 15 DEADLINE SHOULD BE SET FOR ADDING ADDITIONAL 16 PETITIONING CREDITORS

17 An Involuntary Chapter 7 case exists pursuant to Section 303 of the bankruptcy
18 code which requires that two factors be met, namely, that there be three petitioning
19 creditors, and that the debtor be found to be "generally no paying his debts as they become
20 due." An exception exists that if the debtor has fewer than 12 creditors, only one
21 petitioning creditor is required. The alleged debtor has identified his creditors in the
22 Answer. There are 22 and therefore this case must be dismissed.

23 Mr. Stanly's counsel correctly pointed out at the Status Conference that certain
24 creditors are not included in the computation of the total. Section 303(b)(1) requires the
25 creditor to be "such person that is not contingent as to liability or the subject of a bona fide
26 dispute as to liability or amount . . ." and Section 303(b) excludes "any employee or
27 insider of such person and any transferee of a transfer that is voidable under section 544,
28

1 545, 547, 548, 549, or 724(a) of this title.” Since he has not been able to find two other
 2 persons to join him in this jaunt, he is presumably attempting to determine if he can
 3 eliminate nearly half of Mr. Lopez’s creditors so that he can be the sole petitioning
 4 creditor.

5 The requirement that, in the presence of 12 or more creditors, at least 3 must
 6 petition before an order for relief issues is not jurisdictional, but is an absolute defense to
 7 the issuance of an order for relief. *In Re Kidwell*, 158 B.R. 203 (Bkrtcy E.D. Cal. 1993).
 8 If no more petitioning creditors join this case, it is Stanly’s burden to prove that the
 9 alleged debtor has less than 12 creditors. *In Re Smith*, 243 B.R. 169, 183 (Bkrtcy. N.D.Ga.
 10 1999).

11 All creditors are to be counted, no matter how small. The court may *not* exclude
 12 small, recurring or de minimus creditors. *Hornblower & Weeks-Hemphill Noyes v.*
 13 *Okamoto*, 491 F.2d 496 (9th Cir. 1974).¹

14 The alleged debtor requests that this court bifurcate the trial and require Mr. Stanly
 15 to put on testimony and documentary evidence *immediately* establishing that he has met
 16 the requirement of Section 303(b)(1). This does not require further discovery. This will
 17 not require significant court time because the issues are easy. Mr. Lopez is ready for trial
 18 on this issue at any time. In fact, it is unlikely that his testimony will be required at trial.
 19 Per his declaration attached, his 22 creditors are not contingent, or subject of a bona fide
 20 dispute (except Mr. Stanly whose judgment is being appealed). None of the 22 are
 21 employees or insiders. None of these creditors received a payment which was outside of
 22 the ordinary course of business.

23 As to the second issue of whether or not Mr. Lopez is “generally paying his debts as
 24 they become due,” the trial is likely to be lengthy. Significantly more evidence will be
 25

26
 27 ¹ There is a split of authority on this issue in the circuits. For a discussion on the
 28 split, the policy reasons behind both sides of that argument see *Matter of Rassi* (7th Cir.
 1983) 701 F.2d 627, where the court decided to follow the Ninth Circuit, which appears to
 be the majority rule.

1 required and therefore if the case can be dismissed without getting to that issue, justice will
2 be served.

3 In addition, Mr. Stanly should be required to find additional petitioning creditors by
4 a date certain. This case has been pending for more than four months now and Mr. Stanly
5 had knowledge long ago that Mr. Lopez had more than 12 creditors. To allow him an
6 unlimited amount of time to add petitioning creditors only adds to the unfair burden
7 already placed on the alleged debtor. Mr. Lopez requests that the deadline be set for 10
8 days prior to the time set for trial in this matter.

10 III.

11 **THE COURT SHOULD REQUIRE A BOND PURSUANT** 12 **TO SECTION 303(e)**

13 11 USC Section 303(e) provides:

14 “(e) After notice and a hearing, and for cause, the court may require the petitioners
15 under this section to file a bond to indemnify the debtor for such amounts as the court may
16 later allow under subsection (i) of this section.”

17 The court is requested to require the posting of a bond by Mr. Stanly in an amount
18 deemed reasonable to the court but at least \$20,000 as the alleged debtor intends to seek
19 his costs, attorney’s fees and damages once this case is dismissed. The filing of the
20 petition has caused considerable damage to the alleged debtor as certain creditors believe
21 that he filed the case himself and have refused to

22 11 USC Section 303(i) provides:

23 (i) If the court dismisses a petition under this section other than on consent of all
24 petitioners and the debtor, and if the debtor does not waive the right to judgment under this
25 subsection, the court may grant judgment—

26 (1) against the petitioners and in favor of the debtor for—

27 (A) costs; or

28 (B) a reasonable attorney’s fee; or

(2) against any petitioner that filed the petition in bad faith, for—

(A) any damages proximately caused by such filing; or

(B) punitive damages.

In Matter of Dill, 13 B.R. 9, (Bkrtcy.D.Nev 1991) the court looked at the good faith of the petitioning creditors who “appeared to be men of some substantial means who seemed to have filed in good faith” when denying the bond requirement. Also in that case, the property of the estate was a building which was not declining in value and therefore the alleged debtor was deemed not to be in risk. See also, *In re Reed*, 11 B.R. 755 (Bkrtcy S.D.W.Va.1981) Here an order granting fees, costs and damages against Mr. Stanly is likely to be very difficult to collect.

The legislative analysis of this code section states: “The bonding requirement will discourage frivolous petitions as well as spiteful petitions based on a desire to embarrass the debtor (who may be a competitor of a petitioning creditor) or to put the debtor out of business without good cause. An involuntary petition may put a debtor out of business even if it is without foundation and is later dismissed.” Mr. Lopez is at great risk here which is obviously the goal. A significant bond should be required.

IV.

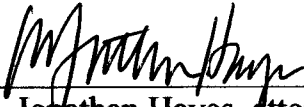
CONCLUSION

The alleged debtor asks this court to bifurcate the trial so that the issue of number of creditors is tried first, set the trial on that issue at the earliest possible time and require the posting of a bond.

Respectfully submitted,


LAW OFFICES OF M. JONATHAN HAYES

Dated: 11/18/05

By: 
M. Jonathan Hayes, attorney for Francis J. Lopez

1
2
3 Signature by the attorney constitutes a certification under Fed. R. Bankr. P. 9011
4 that the relief provided by the order is the relief granted by the court.

5 Submitted by:

6
7 By: 
8 M. Jonathan Hayes
9 Attorney for Francis J. Lopez

DECLARATION OF FRANCIS J. LOPEZ

I, Francis J. Lopez, declare as follows:

1. I am the alleged debtor in this matter. The statements made herein are of my own personal knowledge and if called upon to testify, I could and would competently testify thereto.

2. Alan Stanly and I have been involved in significant litigation against each other since before the bankruptcy filing of our entity Prism. In fact, litigation is pending right now in Superior Court between us, namely Lopez v Stanly, Case No. GIN029692, filed on May 14, 2003, pending in San Diego Superior Court, North County. In that matter, I sued Mr. Stanly for numerous causes of action, including invasion of privacy, breach of fiduciary duty, trespass and identity theft. Mr. Stanly filed a cross-complaint, of course. Recently, in a second case, Mr. Stanly was successful in obtaining a judgment against me for approximately \$50,000 relating to a guarantee both had made to Union Bank of a Prism loan. Recently, in a third case, Mr. Stanly has sued my wife claiming that she "removed property" causing \$2,000 in storage costs. It requests \$2,000 in damages and "compensatory" and punitive damages of "more than \$10,000 up to \$25,000." She has had to retain counsel to defend herself.

3. This involuntary chapter 7 petition is simply an extension of the litigation and a new strategy by Mr. Stanly to cause me and my family as much business and personal pain as possible. On August 11, 2005, I learned that two of my credit cards have been cancelled because the issuer thinks that I filed this bankruptcy myself. The long term costs in terms of increased interest on loans are obvious.

4. Mr. Stanly conducted a debtor's examination of me in Florida on May 9, 2005. The examination transcript covers 65 pages of my testimony. I was asked at length about my creditors and the numbers and total amount owed. My Answer filed in this case specifically identified 22 creditors. The list is attached hereto as Exhibit A.

5. I am ready for trial on this issue at any time. My 22 creditors are not contingent, or subject of a bona fide dispute (except Mr. Stanly whose judgment is being appealed). None of the 22 are employees or insiders. None of these creditors received a payment which was outside of the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed this day of November, 2005 at Destin, FL.

NEXT PAGE
Francis J. Lopez

1 5. I am ready for trial on this issue at any time. My 22 creditors are not
2 contingent, or subject of a bona fide dispute (except Mr. Stanley whose judgment is being
3 appealed). None of the 22 are employees or insiders. None of these creditors received a
4 payment which was outside of the ordinary course of business.
5

6 I declare under penalty of perjury under the laws of the United States of America
7 that the foregoing is true and correct to the best of my knowledge and belief.
8

9 Executed this 17th day of November, 2005 at Destin, FL.

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11 Francis J. Lopez
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FRANCIS LOPEZ
EXHIBIT A
LIST OF CREDITORS

Progressive Insurance
PO Box 31260
Tampa, FL 33631
Acct. 37287380-4
\$157.20
Insurance, Auto

Coastal Community Insurance
12139 Panama City Beach Pkwy.
Panama City Beach, FL 32407
Policy No. LHQ336763
\$1,013.00
Insurance, Flood (Property)

Quicken Platinum Card
PO Box 44167
Jacksonville, FL 32231
\$848.00
Goods and services, 1998- 2005

Okaloosa Gas District
PO Box 548
Valparaiso, FL 32580
\$45.00
Utilities

Northwest Florida Daily News
200 Racetrack Rd.
Ft. Walton Beach, FL 32549
\$45.00
Newspaper

Kelly Plantation Owners Association
4393 Commons Drive E.
Destin, FL 32541
\$550.00
Homeowner's Association

Allstate Floridian
54 Beal Parkway
Ft. Walton Beach, FL 32548
\$1900.00
Homeowners Insurance

Texaco / Shell
PO Box 9151
Des Moines, IA 50368
Acct. No. 77-917-6550-1
\$290.00
Gasoline and related

Bank Of America
PO Box 1390
Norfolk, VA 23501
Acct. No. 4050860512429141
Credit Card, goods and services
\$2386.00

Verizon Wireless
PO Box 660108
Dallas, TX 75266
Acct. No. 81955380600001
\$45.00
Utility – telephone

Cox Communications
PO Box 60970
New Orleans, LA
Acct. No. 0018710003886502
Utility – television and Internet
\$112.00

Union Bank of California
8155 Mercury Ct.
San Diego, CA 92111
Settlement of Union Bank v. Francis Lopez, \$15,000 original balance
\$4,000.00

Bankcard Services
PO Box 15287
Wilmington, DE 19886
Acct. No. 5490999178488929
\$10,000.00
Goods and services – 2001- 2005

Cingular Wireless
PO Box 8229
Aurora, IL 60572
Acct. No. 0050443578
\$125.00
Utilities – telephone

Wayne Wise
810 Red Tanager Ct.
Nashville, TN 37221
\$15,000.00
Personal Loan

Valley Forge Life Insurance
100 CNA Drive
Nashville, TN 37214
Acct. No. VITU045825
\$0.00 (\$486.00 per year)
Life Insurance

American Home Shield
PO Box 849
Carroll, IA 51401
Acct. No. 58449061
\$128.00
Home appliance insurance

Citi Cards
PO Box 6414
The Lakes, NV 88901
Acct. No. 5424180306665024
\$32,515.00
Goods and Services, 1994 - 2005

Household Bank / HSBC
PO Box 5222
Carol Stream, IL 60197
Acct. No. 5176690006732635
Goods and Services, 2003 - 2005
\$5,000.00

American Express
PO Box 297804
Ft. Lauderdale, FL 33329
Acct. No. 378349802283007
\$22,000.00
Goods and Services, 1994 - 2004
Note: Some of this debt may be owed by Prism and/or Stanly, though I have personal
guarantee

Ft. Walton Beach Medical Center
1000 Mar Walt Drive
Ft. Walton Beach, FL 32547
\$1600.00
Medical and Health services
Making payments of \$100.00 month

Alan Stanly
1569 Berkshire Ct.
San Marcos, CA 92069
\$50,000.00
Judgment in Union Bank v. Stanly (cross-complaint by Stanly)
Currently under appeal in CA

PROOF OF SERVICE

I, MJ Hayes, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 21800 Oxnard St., Suite 840, Woodland Hills, CA 91367. On November 18, 2005, I served the within documents:

MOTION BY ALLEGED DEBTOR FOR AN ORDER BIFURCATING TRIAL RE INVOLUNTARY PETITION; SETTING A DEADLINE TO ADD NEW PETITIONING CREDITORS; AND REQUIRING THE POSTING OF A BOND; DECLARATION OF FRANCIS J. LOPEZ

by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

X by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

.. by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.

.. by placing the document(s) listed above in a sealed _____ envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a _____ agent for delivery

.. by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

L. Scott Keehn
Robbins & Keehn, APC
530 "B" Street, Ste 2400
San Diego, CA 92101

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on November 18, 2005, at Los Angeles, California.



MJ Hayes

TAB 35

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
Minute Order**

Hearing Information:

Debtor: FRANCIS J. LOPEZ
Case Number: 05-05926-PB7 **Chapter:** 7
Date / Time / Room: MONDAY, DECEMBER 19, 2005 10:30 AM DEPARTMENT 4
Bankruptcy Judge: PETER W. BOWIE
Courtroom Clerk: MARCIA PEARSON
Reporter / ECR: LYNETTE ALVES

Matters:

- 1) ALLEGED DEBTOR'S MOTION FOR ORDER BIFURCATING TRIAL; SETTING A DEADLINE TO ADD NEW PETITIONING CREDITORS AND REQUIRING A BOND

- 2) STATUS CONFERENCE ON INVOLUNTARY PETITION AND ANSWER (fr. 11/29/05)

Appearances:

M. Jonathan Hayes, ATTORNEY FOR Francis J. Lopez
L. Scott Keehn, ATTORNEY FOR ALAN STANLEY

Disposition:

Bifurcation granted as to number of creditors; bond request withdrawn
1) & 2) Hearings continued to 1/23/06 @ 10:30 a.m.

ASA 0065

TAB 40

1 M. Jonathan Hayes (Bar No. 90388)
2 **Law Office of M. Jonathan Hayes**
3 21800 Oxnard St, Suite 840
4 Woodland Hills, CA 91367
5 Telephone: (818) 710-3656
6 Facsimile: (818) 710-3659
7 jhayes@polarisnet.net

8 Attorneys for Alleged Debtor Francis Lopez

9
10 **UNITED STATES BANKRUPTCY COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
12 **SAN DIEGO DIVISION**

13 In Re:

14 FRANCIS J. LOPEZ,
15 Alleged Debtor

CASE NO. 05-05926-PBINV

Involuntary Chapter 7

**MOTION TO DISMISS
INVOLUNTARY PETITION;
DECLARATIONS OF FRANCIS J.
LOPEZ AND M. JONATHAN HAYES**

Date: April 3, 2006
Time: 11:00 a.m.
Cttrm: 4

23 TO THE HONORABLE PETER W. BOWIE, UNITED STATES BANKRUPTCY
24 JUDGE, TO PETITIONING CREDITOR ALAN STANLY AND ALL INTERESTED
25 PARTIES:
26
27
28

I.

REQUEST FOR DISMISSAL

The petition in this case was filed by a single petitioning creditor Alan Stanly on June 30, 2005. On September 7, 2005, the alleged debtor, Francis Lopez filed his Answer denying all of the material allegations contained therein. Included with his Answer was a list of his creditors, as of the petition date. A copy of that list is attached hereto as Exhibit "A."¹ The list includes the claims of 22 creditors with total claims of \$149,759.00 which includes Mr. Stanly's judgment of \$50,000. Some of these creditors have been paid by Mr. Lopez since the bankruptcy filing.

As the court is aware, Mr. Lopez has been a permanent resident of Florida since July, 2003 when he and his family moved there from California. He owns a residence in Florida and is employed there. Mr. Lopez and his wife have recently agreed to sell their home and the proceeds of the sale will be sufficient to pay all creditors in full. The sale escrow cannot close without this order because of the "cloud" on title caused by this case.

Based thereon, the alleged debtor seeks an order dismissing this bankruptcy case. As part of the dismissal, Mr. Lopez will execute an irrevocable escrow instruction to pay one of the creditors in full, Wayne Wise, whom Mr. Lopez listed with his creditors with a claim of \$15,000. Escrow will also be instructed irrevocably to transfer \$135,000 into the client trust account of M. Jonathan Hayes to be held as follows:

Mr. Hayes will contact each of the remaining 21 creditors in writing and request a written demand for payment. Upon resolution of the amount owed, in writing, Mr. Hayes will cause each creditor to be paid out of the funds in his client trust account. Upon confirmation from the creditor in writing to Mr. Hayes that no amount is owed to a

¹ The court is reminded that in the response to an earlier Motion to Dismiss or Transfer the case, Mr. Stanly asserted that he believed that the alleged debtor had only a few creditors including him (which was why he was the only petitioning creditor at the time).

1 particular creditor, or if the amount owed is less than the amount set forth on Exhibit "A"
2 and is paid, the balance of the funds with respect to those creditors will be returned to Mr.
3 Lopez by Mr. Hayes. Once, each of the 21 creditors are paid or there is written
4 confirmation that no balance is owing, Mr. Hayes will return the remaining funds to Mr.
5 Lopez.

6 With respect to Mr. Stanly's claim, Mr. Lopez intends to post a *supersedeas* bond
7 with the California Superior Court that will automatically effectuate a stay pending appeal
8 of the judgment obtained by Mr. Stanly against Mr. Lopez. The automatic stay pursuant to
9 California C.C.P. 917.1(b) requires a bond from "an admitted surety insurer" of 150% of
10 the \$50,000 judgment or \$75,000. In order to obtain such a bond, Mr. Lopez will be
11 required by the bonding company to post a cash deposit of the full bonded amount of
12 \$75,000. Mr. Lopez will be entitled to use \$50,000 of the funds in the client trust account
13 to collateralize the *supersedeas* bond. If the bond is not obtained and filed with the
14 superior court within fifteen days after the funds are transferred to Mr. Hayes' account,
15 Mr. Hayes will forward \$50,000 to Mr. Stanlys' counsel.

16 The debtor requests an Order Dismissing this Involuntary Petition based on the
17 above arrangement to pay all of his creditors. If escrow does not close within twenty days
18 of entry of the Order, or if there are insufficient funds to pay the full amount indicated to
19 Mr. Hayes' client trust account, Mr. Lopez will stipulate to an Order Vacating the Order
20 Dismissing this case.

21 II.

22 CONCLUSION

23 This case should be dismissed because under the proposal set forth herein every
24 creditor will be paid or adequate irrevocable assurance that they will be paid in the future
25 will be provided. Mr. Lopez' counsel will bring an Order to the hearing and request
26
27
28

1 immediate entry so that the Order may be forwarded to escrow in Florida. A proposed
2 Order is attached hereto as Exhibit "B."

3
4
5 Respectfully submitted,

6 LAW OFFICES OF M. JONATHAN HAYES

7
8
9 Dated: March 23, 2006

By: 

M. Jonathan Hayes, attorney for Francis J.
Lopez

10
11
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13
14 Signature by the attorney constitutes a certification under Fed. R. Bankr. P. 9011
15 that the relief provided by the order is the relief granted by the court.

16
17 Submitted by:

18
19 By: 

M. Jonathan Hayes
Attorney for Francis J. Lopez

DECLARATION OF FRANCIS J. LOPEZ

I, Francis J. Lopez, declare as follows:

1. I am the alleged debtor in this matter. The statements made herein are of my own personal knowledge and if called upon to testify, I could and would competently testify thereto.

2. On September 7, 2005, I filed my Answer along with a list of my creditors, as of the petition date. A true and correct copy of that list is attached hereto as Exhibit "A." The list includes the claims of 22 creditors with total claims of \$149,759.00 which includes Mr. Stanly's judgment of \$50,000. I have paid some of these creditors since the bankruptcy filing.

3. I have been a permanent resident of Florida since July, 2003 when I and my family moved there from California. I own a residence in Florida and am employed there. My wife and I have recently agreed to sell our home and the proceeds of the sale will be sufficient to pay all creditors in full. The sale escrow cannot close without this order because of the "cloud" on title caused by this case.

4. As part of the requested dismissal, my wife and I will execute an irrevocable escrow instruction to pay one of the creditors in full, Wayne Wise, \$15,000 and to transfer \$135,000 into the client trust account of M. Jonathan Hayes to be held to pay my creditors.

5. With respect to Mr. Stanly's claim, I intend to post a *supersedeas* bond with the California Superior Court that will automatically effectuate a stay pending appeal. I have spoken to a number of bonding companies and they will require me to post a cash deposit of the full bonded amount of \$75,000. I will need to use \$50,000 of the funds in the client trust account to collateralize the *supersedeas* bond. I agree, that if the bond is not obtained and filed with the superior court within fifteen days after the funds are transferred to Mr. Hayes' account, Mr. Hayes will forward \$50,000 to Mr. Stanly's counsel.

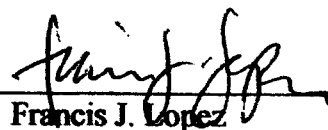
Executed this day of March, 2006 at Destin, FL.

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1 6. I agree that if escrow does not close within twenty days of entry of the Order, or
2 if there are insufficient funds to pay the full amount indicated to Mr. Hayes' client trust
3 account, I will stipulate to an Order Vacating the Order Dismissing this case.

4
5 I declare under penalty of perjury under the laws of the United States of America
6 that the foregoing is true and correct to the best of my knowledge and belief.

7 Executed this 23rd day of March, 2006 at Destin, FL.

8
9 
10 Francis J. Lopez

DECLARATION OF M. JONATHAN HAYES

I, M. Jonathan Hayes, declare as follows:

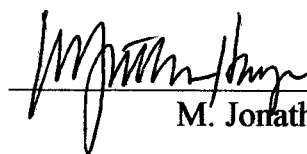
1. I have personal knowledge of the facts set forth below and if called as a witness to testify, I would and could testify competently thereto. I am a member of the California Bar. I am admitted to practice in all the courts of the State of California and am admitted to practice before the District Court of the Central District of California.

2. I have agreed with Mr. Lopez and represent to the court that I will contact each of the 21 creditors in writing and request a written demand for payment. Upon resolution of the amount owed, in writing, I will cause each creditor to be paid out of the funds to be transferred by escrow to my client trust account. Upon confirmation from the creditor in writing to me that no amount is owed to a particular creditor, or if the amount owed is less than the amount set forth on Exhibit "A" and is paid, I will return the balance of the funds with respect to those creditors to Mr. Lopez. Once, each of the 21 creditors are paid or there is written confirmation that no balance is owing, I will return the remaining funds to Mr. Lopez. I will not return the funds to him before that time.

3) If requested by Mr. Lopez, I will send \$50,000 of the funds in the client trust account directly to the bonding company if needed to collateralize the *supersedeas* bond he intends to obtain. If the bond is not obtained and filed with the superior court within fifteen days after the funds are transferred to my account, I will forward \$50,000 to Mr. Stanlys' counsel.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 23 day of March, 2006, at Woodland Hills, California.



M. Jonathan Hayes

FRANCIS LOPEZ
EXHIBIT A
LIST OF CREDITORS

Progressive Insurance
PO Box 31260
Tampa, FL 33631
Acct. 37287380-4
\$157.20
Insurance, Auto

Coastal Community Insurance
12139 Panama City Beach Pkwy.
Panama City Beach, FL 32407
Policy No. LHQ336763
\$1,013.00
Insurance, Flood (Property)

Quicken Platinum Card
PO Box 44167
Jacksonville, FL 32231
\$848.00
Goods and services, 1998- 2005

Okaloosa Gas District
PO Box 548
Valparaiso, FL 32580
\$45.00
Utilities

Northwest Florida Daily News
200 Racetrack Rd.
Ft. Walton Beach, FL 32549
\$45.00
Newspaper

Kelly Plantation Owners Association
4393 Commons Drive E.
Destin, FL 32541
\$550.00
Homeowner's Association

Allstate Floridian
54 Beal Parkway
Ft. Walton Beach, FL 32548
\$1900.00
Homeowners Insurance

Texaco / Shell
PO Box 9151
Des Moines, IA 50368
Acct. No. 77-917-6550-1
\$290.00
Gasoline and related

Bank Of America
PO Box 1390
Norfolk, VA 23501
Acct. No. 4050860512429141
Credit Card, goods and services
\$2386.00

Verizon Wireless
PO Box 660108
Dallas, TX 75266
Acct. No. 81955380600001
\$45.00
Utility – telephone

Cox Communications
PO Box 60970
New Orleans, LA
Acct. No. 0018710003886502
Utility – television and Internet
\$112.00

Union Bank of California
8155 Mercury Ct.
San Diego, CA 92111
Settlement of Union Bank v. Francis Lopez, \$15,000 original balance
\$6,000.00

Bankcard Services
PO Box 15287
Wilmington, DE 19886
Acct. No. 5490999178488929
\$10,000.00
Goods and services – 2001- 2005

Cingular Wireless
PO Box 8229
Aurora, IL 60572
Acct. No. 0050443578
\$125.00
Utilities – telephone

Wayne Wise
810 Red Tanager Ct.
Nashville, TN 37221
\$15,000.00
Personal Loan

Valley Forge Life Insurance
100 CNA Drive
Nashville, TN 37214
Acct. No. VITU045825
\$0.00 (\$486.00 per year)
Life Insurance

American Home Shield
PO Box 849
Carroll, IA 51401
Acct. No. 58449061
\$128.00
Home appliance insurance

Citi Cards
PO Box 6414
The Lakes, NV 88901
Acct. No. 5424180306665024
\$32,515.00
Goods and Services, 1994 - 2005

Household Bank / HSBC
PO Box 5222
Carol Stream, IL 60197
Acct. No. 5176690006732635
Goods and Services, 2003 - 2005
\$5,000.00

American Express
PO Box 297804
Ft. Lauderdale, FL 33329
Acct. No. 378349802283007
\$22,000.00
Goods and Services, 1994 - 2004

Note: Some of this debt may be owed by Prism and/or Stanly, though I have personal guarantee

Ft. Walton Beach Medical Center
1000 Mar Walt Drive
Ft. Walton Beach, FL 32547
\$1600.00
Medical and Health services
Making payments of \$100.00 month

Alan Stanly
1569 Berkshire Ct.
San Marcos, CA 92069
\$50,000.00
Judgment in Union Bank v. Stanly (cross-complaint by Stanly)
Currently under appeal in CA

1 M. Jonathan Hayes (Bar No. 90388)
2 **Law Office of M. Jonathan Hayes**
3 21800 Oxnard St, Suite 840
4 Woodland Hills, CA 91367
5 Telephone: (818) 710-3656
6 Facsimile: (818) 710-3659
7 jhayes@polarisnet.net

8 Attorneys for Alleged Debtor Francis Lopez

9 **UNITED STATES BANKRUPTCY COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**
11 **SAN DIEGO DIVISION**

12 In Re:

13 FRANCIS J. LOPEZ,
14 Alleged Debtor

CASE NO. 05-05926-PBINV

Involuntary Chapter 7

**(Proposed) ORDER DISMISSING
INVOLUNTARY PETITION**

Date: April 3, 2006

Time: 11:00 a.m.

Ctrm: 4

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19
20 A hearing took place at the above time and place, M. Jonathan Hayes appearing for
21 Alleged Debtor Francis Lopez and L. Scott Keehn appearing for Petitioning Creditor Alan
22 Stanly. After consideration of the Motion to Dismiss filed by the Alleged Debtor, and
23 oppositions is any, and good cause appearing,

24
25 IT IS ORDERED:

26 1) The Involuntary Petition is dismissed subject to being reopened as set forth
27 herein.
28

B-1

1 2. Mr. Lopez shall execute an irrevocable escrow instruction to pay one of the
2 creditors in full, Wayne Wise, whom Mr. Lopez listed with his creditors with a claim of
3 \$15,000, as well as to irrevocably transfer \$135,000 into the client trust account of M.
4 Jonathan Hayes.

5 3. Mr. Hayes is ordered to contact each of the remaining 21 creditors in writing
6 and request a written demand for payment. Upon resolution of the amount owed, in
7 writing, Mr. Hayes shall cause each creditor to be paid out of the funds in his client trust
8 account. Upon confirmation from the creditor in writing to Mr. Hayes that no amount is
9 owed to a particular creditor, or if the amount owed is less than the amount set forth on
10 Exhibit "A" to the Motion to Dismiss, and is paid, the balance of the funds with respect to
11 those creditors will be returned to Mr. Lopez by Mr. Hayes. Once, each of the 21 creditors
12 are paid or there is written confirmation that no balance is owing, Mr. Hayes will return the
13 remaining funds to Mr. Lopez.

14 4. Mr. Hayes is authorized to transfer \$50,000 to a bonding company if required to
15 post a cash deposit of the bonded amount. If the bond is not obtained and filed with the
16 superior court within fifteen days after the funds are transferred to Mr. Hayes' account,
17 Mr. Hayes shall forward \$50,000 to Mr. Stanlys' counsel.

18 5. If the sale escrow now pending does not close within twenty days of entry of
19 this Order, or if there are insufficient funds to transfer \$135,000 to Mr. Hayes' client trust
20 account, counsel for the petitioning creditor may seek to vacate this order on shortened
21 notice.

22
23
24 Dated: _____

Hon. Peter W. Bowie
United States Bankruptcy Judge

1
2 **PROOF OF SERVICE**

3 I, MJ Hayes, declare:

4 I am a resident of the State of California and over the age of eighteen years, and not
5 a party to the within action; my business address is 21800 Oxnard St., Suite 840,
6 Woodland Hills, CA 91367. On March 23, 2006, I served the within documents:

7 by placing the document(s) listed above in a sealed envelope with postage
8 thereon fully prepaid, in the United States mail at Los Angeles, California
9 addressed as set forth below.

10 L. Scott Keehn

11 Sarah H. Lanham

12 **ROBBINS & KEEHN, APC**

13 530 B Street, Suite 2400

14 San Diego, CA 92101

15 AND BY EMAIL

16 Northwest Florida Daily News

17 Elenor Hypes

18 200 Racetrack Rd.

19 Fort Walton Beach, FL 32547

20 Alternative Resolution Center

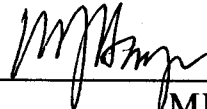
21 11601 Wilshire Blvd., Ste 1950

22 Los Angeles, CA 90025

23 I am readily familiar with the firm's practice of collection and processing
24 correspondence for mailing. Under that practice it would be deposited with the U.S. Postal
25 Service on that same day with postage thereon fully prepaid in the ordinary course of
26 business. I am aware that on motion of the party served, service is presumed invalid if
27 postal cancellation date or postage meter date is more than one day after date of deposit for
28 mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at
whose direction the service was made.

Executed on March 23, 2006, at Los Angeles, California.



MJ Hayes

TAB 43

1 L. Scott Keehn (61691)
2 **ROBBINS & KEEHN, APC**
3 A Professional Corporation
4 530 "B" Street, Suite 2400
5 San Diego, California 92101
6 Telephone: (619) 232-1700

7 Attorneys for **Moving Creditor, ALAN STANLY**

8
9
10 **UNITED STATES BANKRUPTCY COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**
12 **SAN DIEGO DIVISION**

13 In Re:

14 FRANCIS J. LOPEZ

15 Alleged Debtor

) Case No. 05-05926-PBINV

) Involuntary Chapter 7

) **ALAN STANLY'S MEMORANDUM OF**
) **POINTS AND AUTHORITIES IN**
) **OPPOSITION TO MOTION TO DISMISS**
) **INVOLUNTARY PETITION**

) **Date:** April 3, 2006

) **Time:** 11:00 a.m.

) **Ctrm:** 4

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106191/LFK/5311.01

ASA 0081

I

INTRODUCTION

The Motion to Dismiss provides cause for both encouragement and alarm. It is encouraging to the extent that it reflects Lopez's intention to commit his assets to the satisfaction of his debts; but it alarmingly reveals his return to past practices of hood-winking courts and the parties before them so that he can abscond with assets earmarked for the satisfaction of claims.¹ Unfortunately, whatever encouragement can be gleaned from the Motion appears to be eclipsed by the sense of *deja-vu* created by what appears to be just another attempt to lull the Court with a false promise of payment to cover a covert usurpation of assets.²

That relegates us to looking to the substantive merit of the motion, and of that there is none. The Motion is an attempt to establish a payment plan (a *plan of reorganization* as bankruptcy practitioners might say) in Chapter 7 — the one Chapter in the Code where no such Plan was ever contemplated by Congress. It takes that impossible proposal, and makes it more egregious by imposing upon unnoticed creditors an impermissible disparity of treatment in the general unsecured class of claims depending upon the *liquidated* or *unliquidated* nature of the claim. Not surprisingly, Lopez cites not a single authority to support the requested relief. There is none. The Motion can only be denied.

II

FACTUAL CHRONOLOGY OF PERTINENT EVENTS³

1994:	Stanly formed Computer Handyman, Inc. which was later renamed Prism Advanced Technologies, Inc.
1996:	Stanly gave Lopez 50% interest in Prism Advanced Technologies, Inc. ("Prism"). Prism was a California corporation that created, authored and licensed transportation software; and sold computer hardware and services.
11/2002 -	

¹ See, Part III C below regarding the secret sale of Lopez's Carlsbad residence in 2003 in violation of a "no sale" stipulation, and Lopez's subsequent flight (with the proceeds) to Florida.

² *Id.*

³ The facts herein are supported by the Declaration of Alan Stanly, filed concurrently herewith.

ROBBINS & KEEHN, APC
ATTORNEYS AT LAW
2400 UNION BANK BUILDING - 530 "B" STREET
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 232-1700 - TELECOPIER (619) 544-9095

- 03/2003: Dispute arose between Stanly and Lopez regarding personal expenditures Lopez made with Prism's funds; In addition, Stanly learned Lopez had used Prism funds to start a competing business.
- 04/2003: Lopez and Stanly stipulated to appoint Richard Kipperman as receiver to run Prism's affairs. In or about July 8, 2003, the receiver ceased Prism's operations.
- 04/03/2003: Lopez filed *Prism Advanced Technologies, Inc. and Lopez v. Stanly*, San Diego Superior Court Case Number GIN 028765, wherein Lopez claimed civil harassment, and sought Stanly's ejection from Prism's business premises. No hearing on the merits was ever held in this action.
- 04/30/2003: Letter from Union Bank of California to Stanly and Lopez demanding payment on a Prism bank loan (approx. \$300,000), personally guaranteed by both Stanly and Lopez. Union Bank's representative, Adam Karrer, emphasized to Lopez that, if necessary, Union Bank would vigorously pursue Lopez's personal assets to satisfy the obligation.
- 05/14/2003: Lopez filed *Lopez and Prism Advanced Technologies, Inc. v. Stanly*, San Diego Superior Court Case Number GIN 029692 which sought money damages.
- 06/03/2003: Letter from Pacific Carlsbad Partners to Stanly and Lopez requesting payment on an outstanding balance of a promissory note executed by Prism, and personally guaranteed by both Stanly and Lopez. The letter states that Pacific Carlsbad will seek a writ of attachment if a civil collection action is filed.
- 06/26/2003: Union Bank of California filed a civil collection action entitled *Union Bank of California v. Lopez*, San Diego Superior Court Case Number GIN 030827; and Pacific Carlsbad Partners filed a civil collection action entitled *Pacific Carlsbad Partners, LLC v. Prism Advanced Technologies, Lopez and Stanly*, San Diego Superior Court Case Number GIC 813397.
- 07/03/2003: "Stipulation for Temporary Protective Order" filed in *Pacific Carlsbad Partners, LLC v. Prism Advanced Technologies, Lopez and Stanly*, whereby **Stanly and Lopez each stipulate not to sell their residential real property** – assets which could be used to pay the outstanding balance on the note owed to Pacific Carlsbad Partners– **until at least August 8, 2003, the date of the hearing on Pacific Carlsbad Partners's Application for Writ of Attachment.**
- 07/18/2003: **Lopez violates the Stipulation for Temporary Protective Order filed on 07/03/2003, sells his Carlsbad residence – for a price that is below fair market value, and on a shortened escrow – and flees to Florida.**⁴
- 08/22/2003: Involuntary Chapter 7 Bankruptcy Petition filed against Prism in the United States Bankruptcy Court for the Southern District of California, Case

⁴ See also, Lopez Declaration in Support of Motion to Dismiss, ¶2 ("I have been a permanent resident of Florida since July, 2003 when I and my family moved there from California"). Lopez "*Does it to his creditors once — shame on him.*" Now he seeks an opportunity to do it to us twice.

Number 03-07777.

09/20/2004: Judgment entered against Lopez in favor of Stanly in the principal amount of \$50,000 in *Union Bank of California v. Lopez*, San Diego Superior Court Case Number GIN 030827. Interest begins to accrue on that judgment at the statutory rate of 10% per annum.⁵

11/30/2004: Lopez filed a Notice of Appeal of the judgment entered in *Union Bank of California v. Lopez*, in the California Court of Appeal, Fourth Appellate District, Division 1 (San Diego), Case Number: D045451. The appeal is currently stayed, pending the outcome of Lopez's involuntary bankruptcy case. Lopez's California attorneys file quarterly status reports with the Court of Appeal regarding Lopez's bankruptcy (last status report filed on 01/11/2006).

06/30/2005: • Involuntary Chapter 7 Bankruptcy Petition filed herein against Lopez.
• As of this date, Stanly held an undisputed, liquidated claim against Lopez in the amount of 53,877.10,⁶ and disputed and unliquidated claims against Lopez (acquired in the purchase of Prism's assets) in the approximate amount of \$500,000. In addition, Greg Akers, the Chapter 7 Trustee in the Prism Case, holds insider preference avoidance claims in at least the amount of \$25,000.

12/21/2005: Creditor Northwest Florida Daily News filed Joinder in Involuntary Petition for Francis J. Lopez. [Docket Number 36]

12/21/2005: Creditor Alternative Resolution Center filed Joinder in Involuntary Petition for Francis J. Lopez. [Docket Number 37]

02/22/2006: Without notice to any creditors, Lopez listed his Florida residence (a 5-bedroom, custom-built home in a prestigious, gated community) for sale, through listing agent Coastal Properties of N.W. Florida. The list price is \$1,295,000.00.

03/27/2006: • Stanly learns – for the first time – that Lopez has listed his Florida residence for sale, when the Florida process service who is attempting to personally serve Lopez with a Deposition Subpoena sees the For Sale sign, and lock box, on Lopez's vacant residence.
• Lopez files a de facto "Plan" of reorganization masquerading as a motion to dismiss the case. But he fails to give notice to all creditors or to provide treatment to the disputed and unliquidated creditor body.

04/07/2006: • Date escrow is scheduled to close on the sale of Lopez's Florida residence.

⁵ Cal. Code of Civil Procedure §§685.010 [10% per annum] and 685.020(a) [interest begins to accrue upon entry of judgment].

⁶ Includes interest from September 20, 2004 to June 30, 2005 (283 days of interest at \$13.70 per day).

III

DISCUSSIONA. **LOPEZ'S MOTION TO DISMISS IS PROCEDURALLY DEFECTIVE AND SUBSTANTIVELY INDEFENSIBLE**1. **Procedural Defects: Inadequate Notice and No Supporting Authority.**

"All creditors of the alleged debtor have standing to object to the proposed dismissal; they need not meet the qualifications necessary to initiate or join in an involuntary petition."⁷ Here, the Proof of Service filed with Lopez's Motion to Dismiss establishes that the only creditors who have received notice of the Motion are the three petitioning creditors: Alan Stanly, Northwest Florida Daily News, and Alternative Resolution Center. Given that a bankruptcy court will not dismiss a case unless it finds dismissal to be in the best interest of *all* of the parties, *all* of an alleged debtor's creditors must be notified of a request for dismissal, and given an opportunity to object.⁸ Section 303(j) of the Bankruptcy Code specifically states that an involuntary bankruptcy petition may not be dismissed without notice to "all creditors." The purpose of the notice requirement is to protect the non-petitioning creditors from a collusive dismissal.⁹ Here, Lopez's failure to provide all of his creditors with notice of his Motion is fatal to the Motion, and the Motion should be denied.

The second procedural defect in the Motion springs from the substantive flaw described in part (2) below. Specifically, Lopez has ignored the — not insignificant — procedural requirement imposed by LBR 9014-2(b) which clearly mandates that all motions be supported and "*accompanied by ... a memorandum of points and authorities upon which the movant is relying.*" On the face of the moving papers, it is clear that this requirement has been ignored. A thoughtful analysis of the relief requested reveals the reason for the omission: There is no authority to support dismissal under these circumstances or by utilization of the mechanism proposed.

⁷ *In re Taub*, 150 B.R. 96, 98 (Bkrcty. D.Conn. 1993).

⁸ 11 U.S.C. §§303(j); 305(a)(1).

⁹ *In re Rajneesh Neo-Sannyas Intern. Commune*, 59 B.R. 49, 51 (Bkrcty. D.Or. 1986).

1 **2. Fatal Substantive Flaw: No Legal Authority**

2 Lopez should not be granted the requested relief without – *at a minimum* – being required
3 to cite to some authority indicating that the relief he requests is in fact available, and within the
4 Court's power to grant. Alas, there is no authority because the Motion is – in effect – a *de facto*
5 “Plan” of reorganization. Lopez’s Motion consists entirely of a proposed payment plan, the likes
6 of which are available within the statutory framework of a Chapter 11 or Chapter 13 case –but not
7 one in a Chapter 7. There is no existing legal authority that would allow a Chapter 7 debtor to exit
8 the proceedings with a *de facto* “Plan.” Beyond that, the provisions of this plan, which first
9 ignore, and then provide a disparate treatment of disputed and unliquidated claims, make this
10 specific proposal intensely inapposite to the policies of the Bankruptcy Code. Ratable distribution
11 to all creditors — as determined by the definition of §101(5), not just those described in §303 (b)
12 — is an overarching principle and goal of the Bankruptcy Code. Specifically:

13 The purpose of bankruptcy law is to equitably adjust the relationship
14 between a debtor and its creditors, ratably distributing limited assets
15 among competing claimants in accordance with the
16 federally-mandated priority scheme.¹⁰

17 A purpose of bankruptcy is so to administer an estate as to bring
18 about a ratable distribution of assets among the bankrupt’s
19 creditors.¹¹

20 ...historically one of the prime purposes of the bankruptcy law has
21 been to bring about a ratable distribution among creditors of a
22 bankrupt's assets...”¹²

23 It is the purpose of bankruptcy to cause whatever assets the bankrupt
24 has to be distributed ratably among the creditors.¹³

25 Lopez’s proposed plan throws the ratable distribution concept out the window. It addresses
26 only the non-contingent and liquidated claims — those described in §303(b) — and makes no
27 provision for the known unliquidated claims. So under the Lopez *de facto* Plan, the liquidated
28

25 ¹⁰ *In re Auto Parts Club, Inc.*, 224 B.R. 445, 447 (Bankr. S.D. Cal. 1998).

26 ¹¹ *Vanston Bondholders Protective Committee v. Green*, 329 U.S. 156, 161 (1946).

27 ¹² *Young v. Higbee Co.*, 324 U.S. 204, 210 (1945).

28 ¹³ *Hassen v. Jonas*, 373 F.2d 880, 881 (9th Cir. 1967).

claims get paid (presumably 100%), while the unliquidated claim holders get to chase Lopez for whatever may be left. But insofar as the Bankruptcy Code is concerned, both the liquidated and the unliquidated claims occupy the same level of priority — general unsecured claims. Thus the Lopez *de facto* is a scheme that is at odds with the most fundamental underpinnings of the Bankruptcy Code. It can not be put into effect.

If Lopez has a passion for proposing a plan, then he should embrace rather than resist the bankruptcy process, consent to an order for relief under Chapter 11 (or 13 if he qualifies), and move forward with his plan. As it is, he is asking this Court to deprive all creditors of the protections afforded by those chapters that enable debtors to propose restructuring plans. That circumvention is an anathema to the Bankruptcy Code, and this Court should have no part in such a perversion of the Code's most salutary policies.

B. LOPEZ FAILS TO ESTABLISH THE REQUISITE “CAUSE” FOR DISMISSAL

11 U.S.C. §707 governs the dismissal of a Chapter 7 case, and is the beginning point of the Court's analysis of this Motion. Subsection (a) provides a non-exclusive list of what constitutes sufficient “cause” for dismissal, including:

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
- (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

Here, Lopez’s Motion requests dismissal in order to facilitate the close of escrow – **currently scheduled for Friday, April 7, 2006** – on the sale of his Florida home. See, Motion to Dismiss, page 2, lines 13-15 (“The sale escrow cannot close without the [dismissal] order because of the ‘cloud’ on title created by this case”). Certainly, facilitating the sale of an alleged debtor’s only significant asset – a transaction outside the ordinary course of the debtor’s business, and without notice to any creditors – cannot be the sort of “cause” Congress intended to support a dismissal under Section 707.

Lopez’s ostensibly magnanimous gesture of using the proceeds from the sale to pay all the

creditors he listed in his Answer is likewise insufficient to support a dismissal.¹⁴ Significantly, Lopez's "full payment" proposal is based on hopelessly incomplete information: He proposes to sell certain real property without providing any evidence whatsoever as to: (1) the fair market value of the property, (2) the agreed-upon sale price for the property, (3) existing encumbrances on the property, (4) his projected net proceeds, (5) his tax basis in the residence, and/or (6) the tax consequences to the estate (without dismissal) of the sale under its currently terms. Without those fundamental, foundational facts, this Court lacks the evidentiary springboard upon which to take the suggested leap to the conclusion that dismissal would be in the best interest of *all* of Lopez's creditors.¹⁵ Lopez asks the Court and creditors to make that leap on faith alone. The impropriety of that request is self-evident.¹⁶

Lopez's dismissal plan does not even purport to treat all similarly-situated creditors equally. Rather, types of creditors within the same class would be treated differently. Specifically, Lopez has proposed one plan for creditor Wayne Wise (upon sale of Lopez's residence, immediately pay the full amount claimed), another plan for Petitioning Creditor Alan Stanly (an amorphous "bond" scheme which, at best, *may* result in Stanly receiving the outstanding principal amount owed on his judgment without any of the accrued interest), another plan for each of the remaining creditors Lopez chose to list in his Answer (negotiate a "resolution" with each creditor regarding how much Lopez actually owes), and significantly, no plan whatsoever for those creditors who have disputed and/or unliquidated claims. Such disparate treatment is patently

¹⁴ *Matter of Nina Merchandise Corp.*, 5 B.R. 743, 746 (Bkrtcy. N.Y. 1980) ("dismissal should not be granted because of the ability of the debtor to pay off some or all outstanding creditors").

¹⁵ *In re Rajneesh Neo-Sannyas Intern. Commune*, supra, 59 B.R. at 52 (bankruptcy court would not dismiss an involuntary Chapter 7 case where the dismissal would "not assure equal treatment for the unsecured creditors who would share pro-rata in a Chapter 7"); see also, *In re Auto Parts Club, Inc.*, supra, 224 B.R. at 447 ("The purpose of bankruptcy law is to equitably adjust the relationship between a debtor and its creditors, ratably distributing limited assets among competing claimants in accordance with the federally-mandated priority scheme").

¹⁶ This *leap of faith* is made all the more inappropriate when considered in light of Lopez's past misconduct in similar circumstances discussed in part C below.

improper in the context of any chapter,¹⁷ and should be flatly rejected.

C. LOPEZ HAS DEMONSTRATED THAT HE IS NOT TRUSTWORTHY — HIS EXIT FROM BANKRUPTCY REQUIRES COURT SUPERVISION

Lopez has already demonstrated his willingness to dishonor promises made to a court and other parties in pending litigation.¹⁸ Ominously, Lopez appears to be setting up precisely the same forensic scam he used to hinder and evade his creditors in 2003 – sell his residence and flee with the proceeds. In July 2003, just 15 days after executing a written stipulation promising not to sell his Carlsbad residence, Lopez sold that residence and fled to Florida. Now, only a few years later, when aggressive creditors have once again caught up with him, Lopez is attempting to sell his residence – the only significant asset available to satisfy the outstanding claims. Significantly, Lopez listed the Florida residence for sale on February 22, 2006, without any notice whatsoever to the Court or any of the creditors in this case. Lopez remained silent about the sale at the status conference held by this Court on March 20, 2006 – even though at that point the property had been on the market for approximately a month — and that sale was the obvious source of money needed to fund the *pay-and-dismiss* concept discussed at that hearing.

Stanly only recently learned that Lopez's residence was actually for sale when he attempted to serve Lopez with the deposition subpoena in this action, and the Florida process server discovered the For Sale sign, and lock-box on the residence door. Even Lopez's own Motion never clearly discloses the fact that he has already found a buyer for the property, or that it is in escrow, and ready to close. Instead, the Motion is artfully worded to convey the impression that Lopez and his wife only recently decided to put the property on the market for the purported purpose of

¹⁷ Absent the express consent of all creditors that receive something less than the best treatment given to any member of the class (see e.g. §1124(a)(4)).

¹⁸ See Part II above and Stanly Declaration [Regarding his promise not to liquidate his Carlsbad residence prior to an attachment hearing followed by his dishonor of the promise, sacrificial (below the market) sale of that residence, and flight to Florida].

1 paying creditors.¹⁹

2 Given his acts of banditry in earlier proceedings before the Superior Court, and his current
3 lack of candor with respect to his most significant asset, it is clearly essential to keep this debtor
4 safely corralled inside the confines of an orderly bankruptcy proceeding. Lopez provides no
5 evidence to suggest that he can or should be trusted to act in the best interest of his creditors
6 without being forced to do so by this Court; and there is ample evidence to show his propensity to
7 use dishonesty and sharp practices to the detriment of his creditors. There is just no escaping the
8 obvious need to keep Lopez under judicial supervision to insure that he delivers what he promises.

9 **IV**

10 **CONCLUSION**

11 There is absolutely no authority that permits the relief requested. The Motion would
12 pervert rather than promote the policies upon which the Bankruptcy Code is grounded, and robs
13 most of the creditor constituencies of notice and opportunity to be heard. It is poorly conceived
14 and beyond repair. For these and all of the forgoing reasons the Motion must be denied.²⁰

15
16 Dated: March 29, 2006

ROBBINS & KEEHN
A Professional Corporation

17
18
19 By: //s// L. Scott Keehn
20 L. Scott Keehn
21 Attorneys for Petitioning Creditor
22 Alan Stanly

23
24 ¹⁹ See, Motion to Dismiss, page 2, lines 12-14 (“Mr. Lopez and his wife have recently
25 agreed to sell their home and the proceeds of the sale will be sufficient to pay all creditors in
full”).

26 ²⁰ However, to the extent that what the Motion really reflects is Lopez's first step in
27 facing and dealing with his creditors, then that step is to be applauded. The petitioning creditors
28 encourage Lopez to hasten the day when repayment will be realized by consenting to the entry of
an Order for Relief under the chapter of his choosing. Prompt action in that direction may even
permit his estate to preserve and perform the pending sale (or a better one) — which also hastens
the day that Lopez can receive the cash benefit of his homestead exemption.

TAB 47

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 Telephone: (619) 232-1700

Attorneys for **Petitioning Creditor, ALAN STANLY**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION

In Re:

FRANCIS J. LOPEZ

Alleged Debtor

) Case No. 05-05926-PBINV

) Involuntary Chapter 7

) **VERIFIED *EX PARTE* APPLICATION FOR**
) **AN ORDER APPOINTING AN INTERIM**
) **TRUSTEE; AND SUPPORTING**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES, AND DECLARATION OF**
) **LESLIE F. KEEHN**

) [11 U.S.C. §303(g)]

) **Judge: The Honorable Peter W. Bowie**
) **Dept.: Four**

TO: THE HONORABLE PETER W. BOWIE, UNITED STATES BANKRUPTCY JUDGE:

I. VERIFIED APPLICATION

Pursuant to FRBP 2001(a) and 11 U.S.C. §303(g), Petitioning Creditor Alan Stanly ("Stanly") respectfully submits the following Verified *Ex Parte* Application for an Order Appointing an Interim Trustee. Stanly bases this Application on the following enumerated grounds, as well as the accompanying Memorandum of Points and Authorities, and Declaration of Leslie F. Keehn:

IN SEVEN DAYS, THE DEBTOR INTENDS TO CLOSE THE PENDING SALE
OF HIS ONLY SIGNIFICANT ASSET

1. Stanly is aware of only one significant asset owned by alleged debtor Francis J.

106266/LFK/5311.01

ASA 0091

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1 Lopez ("Lopez") – residential real property commonly known as 310 Sand Myrtle Trail, Destin,
2 Florida 32541 (the "Florida Property").

3 2. On March 28, 2006 Stanly learned – for the first time – that the Florida Property
4 had been listed for sale on February 22, 2006, and that Lopez has found a buyer. **ESCROW IS**
5 **SCHEDULED TO CLOSE ON THE SALE OF THE FLORIDA PROPERTY NEXT**
6 **FRIDAY APRIL 7, 2006.** Stanly does not know the agreed-upon sale price, but the Florida
7 Property was listed at a sale price of \$1,295,000. A true and correct copy of the Internet listing of
8 the Florida Property is attached hereto as Exhibit 1.

9 3. Lopez failed to notify Stanly and/or this Court of either one of these critical facts:
10 (1) that the Florida Property had been listed for sale; and (2) that an escrow had been opened, and
11 is scheduled to close on Friday April 7, 2006.

12 4. No mention of the listing and/or sale of the Florida Property was made at the status
13 conference held before this Court on March 20, 2006, even though at that point the Florida
14 Property had been on the market for approximately a month.

15 5. The unsupervised liquidation of what may be the estate's only asset of consequence
16 is an extraordinary event. It heightens the risk of loss to the estate by converting a permanent and
17 immovable asset into a liquid and highly mobile asset which is capable of immediate dissipation.

18 **"PAST BEHAVIOR IS THE BEST PREDICTOR OF FUTURE BEHAVIOR"**¹

19 6. Lopez appears to be reacting to this Involuntary Petition in precisely the same way
20 he reacted in 2003 when his creditors had finally closed in on him, and were about to collect – he
21 conducted a secret sale of his residential real property (in Carlsbad, California), and absconded to
22 Florida with the proceeds, in violation of a court order and his own stipulation (as explained
23 below). His creditors first learned of Lopez's sale of his Carlsbad property when they attempted to
24 personally serve him with process in the pending litigation against him, and discovered the
25 property had been vacated and sold.

26 7. Specifically, on June 26, 2003, creditor Union Bank of California filed a civil

28 ¹ Federal courts recognize "the truth of the axiom that past behavior is the best predictor of future behavior." *U.S. v. Crawford*, 372 F.3d 1048, 1071 (9th Cir. 2004).

1 collection action against Lopez, Stanly and Prism Advanced Technologies, Inc. ("Prism") to
 2 collect the outstanding balance on a bank loan of approximately \$300,000 (*Union Bank of*
 3 *California v. Lopez*, San Diego Superior Court Case Number GIN 030827). Union Bank had
 4 loaned the money to Prism, and Lopez and Stanly, as Prism's officers, had each personally
 5 guaranteed the loan.

6 8. The same day (June 26, 2003), creditor Pacific Carlsbad Partners filed a civil
 7 collection action against Lopez, Stanly and Prism to collect the outstanding balance on a
 8 promissory note of approximately \$40,000 (*Pacific Carlsbad Partners, LLC v. Prism Advanced*
 9 *Technologies, Lopez and Stanly*, San Diego Superior Court Case Number GIC 813397). Pacific
 10 Carlsbad Partners had loaned money to Prism, and Lopez and Stanly, as Prism's officers, had each
 11 personally guaranteed the loan.

12 9. In both collection actions, the creditors sought to attach the property of both Lopez
 13 and Stanly as a prejudgment remedy pending the outcome of the actions. Toward that end, on July
 14 3, 2003, Union Bank obtained a Temporary Protective Order against Lopez and Stanly in which
 15 the Court, *inter alia*, specifically restrained Lopez from selling his residential real property
 16 commonly known as 5461 Los Robles Drive, Carlsbad, California 92008 (the "Carlsbad
 17 Property"). A true and correct copy of that Temporary Protective Order is attached hereto as
 18 Exhibit 2.

19 10. That same day (July 3, 2003), Lopez and Stanly each executed a "Stipulation for
 20 Temporary Protective Order" in favor of Pacific Carlsbad Partners whereby Lopez and Stanly
 21 promised not to sell their residential real property – including the Carlsbad Property – until at least
 22 August 8, 2003, the date of the hearing on Pacific Carlsbad Partners' Application for Writ of
 23 Attachment. A true and correct copy of that Stipulation is attached hereto as Exhibit 3.

24 11. Four days later, on July 7, 2003, Lopez thumbed his nose at both Protective Orders
 25 described above when – without notice to the California Superior Court, or any of his creditors –
 26 he sold the Carlsbad Property for approximately \$700,000 (approximately \$50,000 below fair
 27 market value) in a shortened escrow, and fled to Florida. A true and correct copy of the San Diego
 28 County Recorder's Office transaction record of this sale is attached hereto as Exhibit 4.

12. A scant eight days later, on July 15, 2003, Lopez had consummated the purchase of the Florida Property for approximately \$745,000 (presumably with the purloined proceeds from the Carlsbad Property sale). That left Lopez living comfortably in Florida several weeks before the scheduled attachment hearing on August 8, 2003.

13. Now the past is proving to be prologue to the future as the risk of history repeating itself looms largely as a threat to the efficacy of the bankruptcy process. Lopez has again secretly arranged for the sale of his residence – the only significant asset available to satisfy the claims of the creditors in this proceeding. And he would have gotten away with it *again*, but for the occurrence of one serendipitous event: on or about March 27, 2006, a process server, sent to personally serve Lopez with a Deposition Subpoena, discovered a For Sale sign on the Florida Property, and noted that it was vacant. This triggered Stanly's immediate investigation which revealed the even more alarming details of the impending escrow.

14. If the sale is allowed to proceed without the supervision of a trustee, Lopez's bankruptcy estate may well be emptied of assets, and Lopez's creditors will be left empty-handed *again*.

15. In order to preserve the assets of the estate, and assure a ratable distribution of available assets, an interim trustee must be appointed to fairly administer the proceeds of the sale of the Florida Property for the benefit of Lopez's creditors.

16. Stanly is prepared to furnish a bond in an amount approved by this Court pursuant to FRBP 2001(b). In that connection, Stanly submits that the only damages Lopez may incur is the difference between the interest earned on the trustee's deposit account and other interest or investment opportunities available to Lopez. Absent contrary evidence submitted by Lopez, Stanly submits that the difference will be nominal.

II. MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to FRBP 2002(a) and 11 U.S.C. §303(g), an interim trustee may be appointed in an involuntary proceeding at any time before an order for relief is entered, where, as here, a trustee is "necessary to preserve the property of the estate or to prevent loss to the estate." Under exigent circumstances, an interim trustee may be appointed on an ex parte basis – even without notice to

1 the debtor and/or a hearing. *Matter of R. S. Grist Co.*, 16 B.R. 872 (Dist. Ct. S.D.Fla. 1982)
 2 (without notice to the debtor or a hearing, the bankruptcy court properly granted an ex parte
 3 application to appoint an interim trustee to preserve estate assets).

4 An interim trustee should be appointed where, as here, a debtor has demonstrated an intent
 5 to dissipate an estate's only significant asset. *In re James Plaza Joint Venture*, 62 B.R. 959
 6 (Bkrtcy. S.D.Tex. 1986) (interim trustee appointed where debtors were using the estate's only
 7 asset – a fund of approximately \$150,000 – to pay attorneys and accountants in connection with
 8 State court proceedings). Here, Lopez is attempting to sell the only significant asset that would be
 9 available to satisfy the claims of the creditors in this action – the Florida Property. Once that asset
 10 is sold, it will not be available to the estate. Those exigent circumstances require the appointment
 11 of an interim trustee. *Id.*

12 Luckily, this is not a situation like the one in 2003, where the horse had already left the
 13 barn, and Lopez's creditors did not learn of the sale of his only asset until it was just exactly too
 14 late. This time, there is just enough time to act – to put an interim trustee in place to insure that
 15 Lopez is finally held to account, and his creditors receive ratable distribution. Stanly respectfully
 16 requests that this Court do so by granting this Application.

17 **WHEREFORE**, Stanly respectfully requests that this Court:

- 18 1. Enter an Order appointing an interim trustee to: (1) conduct the sale of the Florida
 19 Property, and (2) preserve and appropriately administer the proceeds from the sale of the Florida
 20 Property; and
- 21 2. For such other and further relief as the court deems reasonable, just and proper.

23 Dated: March 30, 2006

ROBBINS & KEEHN
 A Professional Corporation

26 By: //s// L. Scott Keehn

27 L. Scott Keehn
 Attorneys for Petitioning Creditor
 28 **ALAN STANLY**

III. DECLARATION OF LESLIE F. KEEHN

I, Leslie F. Keehn, declare:

1. I am an attorney with the law firm of Robbins & Keehn, APC, attorneys of record for Petitioning Creditor, Alan Stanly. I have personal knowledge of the facts stated herein.

2. On March 30, 2006, at approximately 3:45 p.m., I called this Court to notify it of the filing of this *Ex Parte* Application.

3. On March 30, 2006, at approximately 4:00 p.m., I called Lopez's attorney, Jonathan Hayes, to notify him of the filing of this *Ex Parte* Application. Mr. Hayes' office informed me that Mr. Hayes was not in the office, and I was transferred to his voicemail. I left Mr. Hayes a detailed message explaining that this *Ex Parte* Application would be electronically filed with this Court at some point during the evening of March 30, 2006. I further informed Mr. Hayes that the purpose of this *Ex Parte* Application is to obtain an order from this Court appointing an interim trustee to conduct the sale of Lopez's Florida Property. I further informed Mr. Hayes that my office would serve them with a copy of this *Ex Parte* Application via email and facsimile to Mr. Hayes' office.

4. I personally arranged to fax copies of this *Ex Parte* Application to the United States Trustee, the other Petitioning Creditors, and Camille Collins (Lopez's listing agent for the sale of the Florida Property) on March 30, 2006 (immediately after the Application has been filed with this Court).

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct, and that this Declaration was executed on March 30, 2006 at San Diego, California.

//s/ Leslie F. Keehn
LESLIE F. KEEHN

VERIFICATION

I, **ALAN STANLY**, declare:

I am over the age of eighteen (18) and am a Petitioning Creditor in these proceedings. I have read the foregoing "**VERIFIED EX PARTE APPLICATION FOR AN ORDER APPOINTING AN INTERIM TRUSTEE**" and know the contents thereof. Based upon my personal knowledge, I know that the factual matters stated in the "Verified Application" are true and correct to the best of my knowledge, information, and belief.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct, and that this Verification was executed on March 30, 2006 at San Marcos, California.

//s// Alan Stanly

ALAN STANLY

ROBBINS & KEEHN, APC
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2400 UNION BANK BUILDING - 530 "B" STREET
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EXHIBIT 1

ASA 0098



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Home Information:

Address: 310 Sand Myrtle Trail
City: Destin State: Florida Zip: 32541

Description: A stunning custom home with all the features a family needs. It has a lovely foyer with an alabaster chandelier, gourmet kitchen, home office, and too many extras to list. A quality home, and the best value in Kelly Plantation, the most prestigious gated community in Destin.

☒ [Tell a Friend](#) ☒ [Map Direction](#)



[closer look](#)



[closer look](#)

Image Not
Available

[closer look](#)

Image Not
Available

[closer look](#)

Date Post: 2/22/2006 10:25:56 AM Price: \$1,295,000.00

Beds: 5 Baths: 3.5 Garage: 2 Sq feet: 4000 - 5000 Years built: 1997

Instant Love Alert

Find a ☐ Girl ☐ Guy in for

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EXHIBIT 2

ASA 0100

AT-140

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State bar number, and address): Jeffrey Isaacs (Bar No. 042622) Gerald P. Kennedy (Bar No. 105887) Procopio, Cory, Hargreaves & Savitch LLP 530 "B" Street, Suite 2100 San Diego, California 92101 TELEPHONE NO.: 619-515-3239 FAX NO.: 619-235-0398 ATTORNEY FOR (Name): Plaintiff Union Bank of California, N.A.		FOR COURT USE ONLY F I L E D Clerk of the Superior Court JUL 03 2003 BY: A. LUM
NAME OF COURT: San Diego Superior Court STREET ADDRESS: 325 South Melrose Drive MAILING ADDRESS: CITY AND ZIP CODE: Vista, California 92083 BRANCH NAME: North County Division		
PLAINTIFF: UNION BANK OF CALIFORNIA, N.A., a National banking association DEFENDANT: FRANCIS J. LOPEZ, ALAN STANLY, and DOES I through IV, inclusive		
TEMPORARY PROTECTIVE ORDER		
		CASE NUMBER: GIN 030827

1. The court has considered the application of plaintiff for
- ☒ a right to attach order, order for issuance of writ of attachment pursuant to Chapter 4 (beginning with Code Civ. Proc., § 484.010), and a temporary protective order.
 - ☐ an ex parte right to attach order and order for issuance of writ of attachment under Chapter 5 (beginning with Code Civ. Proc., § 485.010).

FINDINGS

2. THE COURT FINDS

- Defendant is a ☒ natural person ☐ partnership ☐ unincorporated association ☐ corporation ☐ other (specify):
- The amount sought to be secured by the attachment under the application for the right to attach is: \$
- The claim upon which the application for attachment is based is one upon which an attachment may be issued under Code of Civil Procedure section 483.010.
- Plaintiff has established the probable validity of the claim upon which the application for the attachment is based.
- The order is not sought for a purpose other than the recovery upon the claim on which the application for the attachment is based.
- Great or irreparable injury will result to the plaintiff if this order is not issued, based on the following:
 - ☒ There is a danger that the property sought to be attached would be
 - ☒ concealed.
 - ☐ substantially impaired in value.
 - ☒ made unavailable to levy by other than concealment or substantial impairment in value.
 - ☐ Defendant has failed to pay the debt underlying the requested attachment and is insolvent as defined in Code of Civil Procedure section 485.010, subdivision (b)(2).
 - ☐ A bulk sales notice was recorded and published pursuant to Division 6 (beginning with section 6101) of the Commercial Code with respect to a bulk transfer by the defendant.
 - ☐ An escrow has been opened pursuant to the provisions of Business and Professions Code section 24074 with respect to the sale by the defendant of a liquor license. The liquor license number is:
 - ☒ Other circumstances: Plaintiff is informed defendants' real property located at 5461 Los Robles Drive, Carlsbad, California is currently listed for sale and that any proceeds from the sale may be concealed or otherwise made available to levy by other than concealment pending entry of judgment in the matter absent a temporary protective order.
- ☒ The requirements of Code of Civil Procedure section 485.220 are satisfied, but a temporary protective order should issue instead of an ex parte right to attach order and order for issuance of writ of attachment.
- Plaintiff must file an undertaking in the amount of: \$ 10,000 before a temporary protective order shall issue, and plaintiff has filed an undertaking in that amount. **OTHER THAN THOSE NECESSARY FOR ORDINARY LENDING**
- The property subject to the following order is: The real property commonly known as 5461 Los Robles Drive, Carlsbad, California 92008, and the proceeds from the refinancing of the real property distributed to Defendant Francis J. Lopez out of Escrow No. 122817-SRW, at American Title Company, 1440 North Harbor Boulevard, Suite 108, Fullerton, CA 92836, on or about June 20, 2003. **EXPENSES HEREAFER INCURRED**

(Continued on reverse)

SHORT TITLE: Union Bank v. Lopez, et al.

CASE NUMBER:
GIN 030827

2. j. ☐ The following property of defendant is inventory or farm products held for sale and may be transferred in the ordinary course of business (*specify*):
- k. ☐ Other (*specify*):

ORDER**3. THE COURT ORDERS**

- a. Defendant shall not transfer, directly or indirectly, any interest in the property described in item 2i of the findings.
- b. ☐ Defendant shall not dispose of the proceeds of any transfer of inventory or farm products held for sale except under the following restrictions:
- c. ☐ Other (*specify*):

d. This order shall expire at the earliest of the following times:

- (1) when plaintiff levies upon specific property described in this order,
- (2) after (date): _____, or
- (3) 40 days after the issuance of this order.

4. Number of pages attached: _____

Date: _____

JUL 03 2003
THOMAS P. NUGENT

(TYPE OR PRINT NAME)

The foregoing instrument is a full, true and correct copy of the original on file in this office.

Attest: **SEP 12 2003**
Clerk of the Superior Court of the State of California,
In and for the County of San Diego.

By E. Gonzalez Deputy

(SIGNATURE OF JUDGE OR COMMISSIONER)

NOTICE TO DEFENDANT: An undertaking has been filed with the court by plaintiff. You may object to the undertaking.

- a. You may issue any number of checks against any of your accounts in a financial institution in this state in any amount for the following purposes:
- (1) Payment of any payroll expense (including fringe benefits and taxes and premiums for workers' compensation and unemployment insurance) falling due in the ordinary course of business prior to the levy of a writ of attachment.
 - (2) Payment for goods thereafter delivered to you C.O.D. for use in your trade, business, or profession.
 - (3) Payment of taxes if payment is necessary to avoid penalties which will accrue if there is any further delay in payment.
 - (4) Payment of reasonable legal fees and reasonable costs and expenses required for your representation in the action.
- b. In addition, you may issue any number of checks for any purpose so long as the total amount of such checks does not exceed the greater of the following:
- (1) The amount by which the total amount on deposit exceeds the sum of the amount sought to be secured by the attachment and the amounts permitted to be paid pursuant to this notice.
 - (2) One thousand dollars (\$1,000).
- c. If the property is farm products held for sale or is inventory, the temporary protective order may not prohibit you from transferring the property in the ordinary course of business, but may impose appropriate restrictions on the disposition of the proceeds from such transfer.

(SEAL)

CLERK'S CERTIFICATE

I certify that the foregoing is a correct copy of the original on file in my office.

Date: _____

Clerk, by _____, Deputy

EXHIBIT 3

ASA 0103

BARRY E. HAGER (SBN 137973)
M. ANDREW SCHNEIDER (SBN 219441)
TREITLER & HAGER, LLP
3737 Camino del Rio South, Suite 109
San Diego, California 92108
Telephone: 619 283-1111
Facsimile: 619-528-0746

FILED
Clerk of the Superior Court
JUL 03 2003
By: SCOTT SEYLER, Deputy

Attorneys for Plaintiff PACIFIC CARLSBAD PARTNERS, LLC

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF COUNTY OF SAN DIEGO

PACIFIC CARLSBAD PARTNERS, LLC,
a California Limited Liability Company,

Plaintiff,

vs.

PRISM ADVANCED TECHNOLOGIES,
INC., a California Corporation, FRANCIS
J. LOPEZ, an individual, ALAN STANLY,
an individual, and DOES 1 through 10,
inclusive,

Defendants.

Case No. GIC 813397

**STIPULATION FOR TEMPORARY
PROTECTIVE ORDER**

Date: July 3, 2003
Time: 8:30 a.m.
Dept: 65

IT IS HEREBY STIPULATED by and between Plaintiff PACIFIC CARLSBAD
PARTNERS, LLC, through its attorneys of record, and Defendants FRANCIS J. LOPEZ and
ALAN STANLY that a temporary protective order shall issue as follows:

1. FRANCIS J. LOPEZ ("LOPEZ") will not transfer, directly or indirectly, any
interest in real property owned by LOPEZ, including, but not limited to, the certain
real property located at 5461 Los Robles Drive, Carlsbad, California 92008
2. ALAN STANLY ("STANLY") will not transfer, directly or indirectly, any interest
in real property owned by STANLY, including, but not limited to, not to further
encumber the certain real property located at 1569 Berkshire Court, San Marcos,
California 92069

1 The temporary protective order shall be effective commencing July 3, 2003 and shall
2 remain in effect through and until the Court's hearing on Plaintiff's Application for Writ of
3 Attachment, which is scheduled for August 8, 2003.

4 The parties hereby waive any requirement that Plaintiff file an undertaking prior to the
5 issuance of the temporary protective order.

6
7 IT IS SO STIPULATED:

8
9 Dated: 7/2/03

TREITLER & HAGER, LLP

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By Barry E. Hager
BARRY E. HAGER
Attorney for Plaintiff
PACIFIC CARLSBAD PARTNERS,
LLC

Dated: _____

By _____
FRANCIS J. LOPEZ

Dated: _____

By _____
ALAN STANLY

1 The temporary protective order shall be effective commencing July 3, 2003 and shall
2 remain in effect through and until the Court's hearing on Plaintiff's Application for Writ of
3 Attachment, which is scheduled for August 5, 2003.

4 The parties hereby waive any requirement that Plaintiff file an undertaking prior to the
5 issuance of the temporary protective order.

6
7 IT IS SO STIPULATED:

8
9 Dated: _____

TRETTLER & HAGER, LLP

10
11 By _____

BARRY E. HAGER
Attorney for Plaintiff
PACIFIC CARLSBAD PARTNERS,
LLC

12
13
14
15
16 Dated: 7-2-03

By _____

FRANCIS J. LOPEZ

17
18
19
20 Dated: _____

By _____

ALAN STANLY

1 The temporary protective order shall be effective commencing July 3, 2003 and shall
2 remain in effect through and until the Court's hearing on Plaintiff's Application for Writ of
3 Attachment, which is scheduled for August 8, 2003.

4 The parties hereby waive any requirement that Plaintiff file an undertaking prior to the
5 issuance of the temporary protective order.

6
7 IT IS SO STIPULATED:

8
9 Dated: _____

TREITLER & HAGER, LLP

10
11 By _____

12 BARRY E. HAGER
13 Attorney for Plaintiff
14 PACIFIC CARLSBAD PARTNERS,
15 LLC

16 Dated: _____

17 By _____

18 FRANCIS J. LOPEZ

19
20 Dated: 7/24/03

21 By  _____

22 ALAN STANLY

EXHIBIT 4

ASA 0108

Westlaw.

APN: 210-115-06-00

Page 1

REAL PROPERTY TRANSACTION RECORD

Filings Collected Through:03-22-2006
County Last Updated:03-30-2006
Frequency of Update:WEEKLY
Current Date:03/30/2006
Source:COUNTY RECORDER
, SAN DIEGO, CALIFORNIA

OWNER INFORMATION

Owner(s):LANG RMD TRUST
Ownership Rights:PERSONAL TRUST
Additional Owner #1:LANG RMD TRUST
Owner Rights:PERSONAL TRUST
Property Address:5461 LOS ROBLES DR
CARLSBAD CA 92008-4423
Mailing Address:5461 LOS ROBLES DR
CARLSBAD CA 92008-4423

PROPERTY INFORMATION

County:SAN DIEGO
Assessor's Parcel Number:210-115-06-00
Property Type:SINGLE FAMILY RESIDENCE - TOWNHOUSE
Land Use:SINGLE FAMILY RESIDENCE
Building Square Feet:1651

TRANSACTION INFORMATION

Transaction Date:07/07/2003
Seller Name:LOPEZ FRANCIS J
Sale Price:\$700,000.00
Consideration:SALE PRICE (FULL)
Deed Type:GRANT DEED
Type of Transaction:RESALE
Mortgage Amount:\$560,000.00
Mortgage Type:CONVENTIONAL
Mortgage Term:30 YEARS
Mortgage Deed Type:DEED OF TRUST
Mortgage Date:07/16/2003
Mortgage Due Date:08/01/2033
Interest Rate:ADJUSTABLE
Lender Name: COUNTRYWIDE HM LNS INC
Lender Address: CALABASAS, CA 91302-1613
Recording Date:07/18/2003

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ASA 0109

APN: 210-115-06-00

Page 2

Document Number:860383
Title Company:CHICAGO TITLE CO.
Construction Type:RESALE
Purchase Payment:MORTGAGE

TAX ASSESSOR RECORD is available for this property. The record contains information from the office of the local real property tax assessor office. In addition to identifying the current owner, the record may include tax assessment information, the legal description, and property characteristics. Additional charges may apply.

TRANSACTION HISTORY REPORT is available for this property. The report contains details about all available transactions associated with this property. The report may include information about sales, ownership transfers, refinances, construction loans, 2nd mortgages, or equity loans based on recorded deeds. Additional charges may apply.

Call Westlaw CourtExpress at 1-877-DOC-RETR (1-877-362-7387)
to order copies of documents related to this or other matters.
Additional charges apply.

END OF DOCUMENT

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ASA 0110

TAB 52

CSD 1001A [21/15/04]
Name, Address, Telephone No. & I.D. No.

L. Scott Keehn (61691)
ROBBINS & KEEHN, APC
A Professional Corporation
530 "B" Street, Suite 2400
San Diego, California 92101
Telephone: (619) 232-1700



UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In Re

FRANCIS J. LOPEZ

Alleged Debtor.

BANKRUPTCY NO. 05-05926-PBINV

Date of Hearing: N/A

Time of Hearing: N/A

Name of Judge: N/A

**CONSENT ORDER ENJOINING SALE OR TRANSFER OF REAL PROPERTY LOCATED AT
310 SAND MYRTLE TRAIL, DESTIN, FLORIDA, 32541
A M E N D E D ***

IT IS ORDERED THAT the relief sought as set forth on the continuation pages attached and numbered two (2) through 2 with exhibits, if any, for a total of 4 pages, is granted. Motion/Application Docket Entry No. 49

//

//

//

//

//

//

DATED: April 07, 2006

Signature by the attorney constitutes a certification under Fed. R. of Bankr. P. 9011 that the relief in the order is the relief granted by the court.

Submitted jointly by:

Robbins & Keehn, APC
(Firm name)

By: //s/ L. Scott Keehn
Attorneys for ☒ Movant ☐ Respondent

Judge, United States Bankruptcy Court

Law Offices of M. Jonathan Hayes
(Firm name)

By: //s/ M. Jonathan Hayes

ASA 0111

Debtor: Francis Lopez

BANKRUPTCY NO. 05-05926-PBINV

The Court, having reviewed the "Stipulation for Entry of Consent Order Enjoining Sale or Transfer of Debtor's Real Property" filed concurrently herewith, and good cause therefore appearing;

IT IS HEREBY ORDERED, that:

1. Until further order of this court, Francis J. Lopez, the alleged Debtor herein, together with all of his agents, employees, escrow agents, attorneys, and all persons acting pursuant to his request, or direction, or acting in concert with him, are restrained, enjoined, and prohibited from causing, permitting, or suffering the sale or transfer of any interest of Francis J. Lopez in or to that certain residential real property commonly known as 310 Sand Myrtle Trail, Destin, Florida, 32541, and more fully described in Exhibit "1" attached hereto and incorporated herein by this reference (the "Property").

2. Without limiting the generality of the foregoing, and until further order of this court, Francis J. Lopez, the alleged Debtor herein, together with all of his agents, employees, escrow agents, attorneys, and all persons acting pursuant to his request, or direction, or acting in concert with him, are restrained, enjoined, and prohibited from causing, permitting, or suffering that certain escrow mentioned at First American Title identified as Commitment No.1054-1126315 to close.

3. Francis J. Lopez shall cause a true copy of this order to be delivered to his escrow agent at First American Title with respect to Commitment No.1054-1126315, not later than April 7, 2006, by e-mail or fax.

4. A certified copy of this Order may be recorded or filed in the official Real Property Records of the county (or counties) in which the Property is located.

*Amended to include Exhibit "1"

ASA 0112

EXHIBIT "1"

ASA 0113

Signed by Judge James W. Meyers April 07, 2006

L. SCOTT KEEHN - Legal Description

From: "M. Jonathan Hayes" <jhayes@polarisnet.net>
To: "L. SCOTT KEEHN" <LSK@robbins-keehn.com>
Date: 4/6/2006 11:15:47 AM
Subject: Legal Description

The legal description is as follows:

Lot 5, Block I, KELLY PLANTATION PHASE II, according to the Plat thereof as recorded in
Plat Book 15, Page(s) 59 & 60, of the Public Records of Okaloosa County, Florida.

I have asked the title company to send me the name of the escrow.

Jon

ASA 0114

TAB 76

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
Minute Order**

Hearing Information:

Debtor: FRANCIS J. LOPEZ
Case Number: 05-05926-PB7 **Chapter:** 7 INVOLUNTARY
Date / Time / Room: MONDAY, JUNE 26, 2006 02:00 PM DEPARTMENT 4
Bankruptcy Judge: PETER W. BOWIE
Courtroom Clerk: MARILYN WILKINSON
Reporter / ECR: COLLETTA JOHNSON

Matters:

- 1) ALLEGED DEBTOR'S MOTION FOR SUMMARY JUDGMENT & ORDER DISMISSING INVOLUNTARY PETITION
- 2) PETITIONING CREDITORS' MOTION FOR SUMMARY JUDGMENT ON PHASE 1 OF BIFURCATED INVOLUNTARY PETITION, OR ALTERNATIVELY, SUMMARY ADJUDICATION OF FACTS NOT SUBJECT TO MATERIAL DISPUTE
- 3) STATUS CONFERENCE ON INVOLUNTARY PETITION AND ANSWER
(fr. 5/4/06)

Appearances:

M. Jonathan Hayes, ATTORNEY FOR Francis J. Lopez
L. Scott Keehn, ATTORNEY FOR ALAN STANLY
Mr. Stanly & Mr. Lopez, present

Disposition:

- 1 & 2) Simultaneous Briefs not to exceed 5 pages re: § 549 transfers to be filed and served on 7/7/06. No reply. Matter will then be under submission. Contested.
- 3) To be re-set, if needed.

cc: Barbara

ASA 0115

TAB 86

WRITTEN DECISION NOT FOR PUBLICATION

ENTERED	<u>9/26/06</u>
FILED	
SEP 26 2006	
CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA	
BY	<u>64</u> DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re	)	Case No. 05-05926-PBINV
)	
FRANCIS J. LOPEZ,	)	ORDER ON MOTION FOR
	)	SUMMARY JUDGMENT
Alleged Debtor.)	
)	

On September 30, 2005, Alan Stanly commenced this case by filing an involuntary petition against alleged debtor, Francis Lopez. Northwest Florida Daily News later joined in the petition. Lopez challenged the petition on the ground that three petitioning creditors were necessary under Bankruptcy Code § 303(b)(1) because twelve or more entities held claims against him. On June 26, 2006, the Court held a hearing on the parties' cross-motions for summary judgment on the issue of the number of holders of claims against Lopez for the purposes of § 303(b). The Court requested additional briefing and took the matter under submission.

///

1 On July 20, 2006, before the Court ruled on the motions,
2 Richard Kipperman, who asserts a claim against Lopez in the
3 amount of \$30,968.57, filed a joinder in the involuntary
4 petition. On the same date Stanly filed a "Suggestion of
5 Mootness" contending that the issue regarding whether there are a
6 sufficient number of creditors to support an involuntary petition
7 is now moot as a result of Mr. Kipperman's joinder, thereby
8 raising to three the number of petitioning creditors and
9 satisfying the requirements for the filing of an involuntary
10 bankruptcy petition regardless of the number of creditors
11 included in the "Section 303" count.

12 On the Court's direction Lopez filed a response to the
13 Suggestion of Mootness. He contends that Mr. Kipperman (and
14 Northwest Florida Daily News for that matter) does not qualify
15 as a petitioning creditor.

16 **Number of Holders of Claims**

17 Bankruptcy Code Section 303(b) provides:

18 (b) An involuntary case against a person is commenced
19 by the filing with the bankruptcy court of a petition
under chapter 7 or 11 of this title-

20 (1) by three or more entities, each of which is either
21 a holder of a claim against such person that is not
22 contingent as to liability or the subject of a bona
fide dispute as to liability or amount, or an indenture
trustee representing such a holder, if such
23 noncontingent, undisputed claims aggregate at least
\$12,300 more than the value of any lien on property of
24 the debtor securing such claims held by the holders of
such claims;

25 (2) if there are fewer than 12 such holders, excluding
any employee or insider of such person and any
26 transferee of a transfer that is voidable under section
544, 545, 547, 548, 549, or 724(a) of this title, by

1 one or more of such holders that hold in the aggregate
2 at least \$12,300 of such claims;

3 On September 7, 2005, Lopez filed an answer to the petition
4 alleging that he had more than 12 creditors, and thus there were
5 an insufficient number of petitioners. On September 19, 2005,
6 Lopez filed a declaration listing those creditors -- twenty-two
7 in all.

8 Stanly, on the other hand, argues that many of the creditors
9 asserted by Lopez do not qualify to be counted in the
10 determination of whether there are 12 or more creditors for
11 various reasons. Of the twenty-two alleged holders of claims,
12 Stanly contends that:

13 -- seven did not hold a claim against Lopez as of the
14 petition date;

15 - one (Alan Stanly) is an excluded "insider" of Lopez;

16 -- three are "disputed";

17 -- nine received postpetition transfers voidable under
18 § 548; and

19 -- eleven received preferences voidable under § 547.

20 The Court has considered the arguments and evidence
21 submitted by Stanly and Lopez regarding each of the alleged
22 creditors and finds as follows with respect to each.

23 **Allstate Floridian:**

24 As to this creditor, Stanly contends that it did not hold a
25 claim as of June 30, 2005 -- the date of the petition. Lopez
26 counters that prepetition the premium amount was adjusted upward

1 so there was a balance owing of \$134. The Court finds that
2 according to the premium statement, which Lopez provided, an
3 additional amount was owing as of the petition date -- that is,
4 the covered period July, 2004 through July, 2005 was not
5 necessarily paid in full as Stanly suggests. The Court finds
6 that this creditor should be counted.

7 **American Express:**

8 Stanly initially contended that American Express did not
9 hold a claim as of the petition date. However, in his reply
10 Stanly concedes that this creditor should be counted.

11 **American Home Shield:**

12 Again, Stanly contends that this creditor did not hold a
13 claim as of the petition date. In his opposition Lopez argued
14 that as of the petition date he was indebted to this creditor in
15 the amount of \$128. However, Lopez provides no evidence of such
16 and does not even mention this creditor in his declaration. It
17 appears from Exhibit E to the Declaration of L. Scott Keehn in
18 support of Petitioning Creditors' Motion for Summary Judgment
19 (Keehn Dec.) that this creditor's policy was paid up through
20 7/16/05. Since Lopez has provided no evidence to the contrary,
21 the Court finds that this creditor should not be counted.

22 **B of A:**

23 Stanly contends that this creditor should not be counted
24 because it received preferential payments which are voidable
25 under § 547 and postpetition payments voidable under § 548.
26 Lopez admits that minimum payments were made on this account, but

1 argues that they were made in the ordinary course of business.

2 While the "ordinary course" defense might apply to the
3 alleged preferences, there is no comparable defense to the
4 admitted postpetition transfers. It is clear Lopez made
5 postpetition payments to this creditor. While they are
6 authorized under § 303(f), they are nevertheless voidable. See
7 § 549(a)(2). Section 549(b) provides that in an involuntary case
8 such a transfer may not be avoided to the extent value is given
9 in exchange. However, Lopez has provided no evidence of any such
10 value being received. Thus, the Court finds that this creditor
11 should not be counted.

12 **Bankcard Services:**

13 Stanly contends that this claim is subject to a bona fide
14 dispute as to the late fees. Stanly also argues that this
15 creditor should not be counted because it received preferential
16 payments which are voidable under § 547.

17 Lopez has provided evidence that the issue over late fees
18 had been resolved. Lopez also argues that the payments were made
19 in ordinary course in order to keep the account current.

20 The Court finds that Stanly has failed to establish that
21 there is a bona fide dispute. In the deposition transcript of
22 Lopez (175:18-177-13), upon which Stanly relies, Lopez merely
23 says that he probably does not agree that the \$39 late fee should
24 have been charged and that it was probably resolved on another
25 statement. The Court does not find that this establishes that
26 the claim is subject to a bona fide dispute.

1 Stanly argues that Lopez failed to provide evidence of his
2 payment practices with respect to this creditor or creditor's
3 requirements. However, the Court is comfortable accepting
4 Lopez's assertion that this credit card company requires minimum
5 monthly payments in the ordinary course. Stanly has provided no
6 evidence that Lopez made unusual payments to this creditor. The
7 Court finds that this creditor should be counted.

8 **Cingular Wireless:**

9 Stanly contends that this creditor should not be counted
10 because it received preferential payments which are voidable
11 under § 547 and postpetition payments voidable under § 548.
12 Lopez admits that payments were made on this account, but argues
13 that they were made in the ordinary course of business and to
14 maintain service. Lopez also contends that most of the payments
15 were made by Noveon - his employer.

16 As with B of A, discussed above, while the "ordinary course"
17 defense might apply to the alleged preferences, there is no
18 comparable defense to the admitted postpetition transfers. It is
19 clear Lopez made postpetition payments to this creditor. While
20 they are authorized under § 303(f), they are nevertheless
21 voidable. See § 549(a)(2). Section 549(b) provides that in an
22 involuntary case such transfer may not be avoided to the extent
23 value is given in exchange. However, Lopez has provided no
24 evidence of any such value being received. Further, the evidence
25 indicates that Lopez owed a prepetition balance and that the
26 entire bill was paid postpetition. Thus, to the extent any

1 postpetition value was given by Cingular, the amount of the
2 payments would have exceeded this value and thus some portion
3 would be recoverable -- the exception under § 549(b) is only "to
4 the extent any value ... is given." Finally, Lopez provides no
5 evidence that any of the payments were made by his employer.

6 Thus, the Court finds that this creditor should not be
7 counted.

8 **Citicards:**

9 Stanly contends that this creditor should not be counted
10 because it received preferential payments which are voidable
11 under § 547. Lopez admits that payments of \$379/month were made,
12 but argues that they were made in the ordinary course to keep the
13 account current per an agreement with Citicards. The payments
14 were direct debits from his checking account.

15 Unlike that discussed in connection with Bankcard Services
16 above, this does not appear to be a typical minimum payment
17 situation where the minimum amount due changes based upon the
18 prior month's activity. Rather, this appears to be an
19 arrangement Lopez reached with this creditor to repay an
20 overextended account. Lopez contends that he paid \$379/month.
21 However, Stanly's undisputed evidence indicates that Lopez made
22 two payments each month. Again, Lopez has failed to establish
23 that this is a typical ordinary course arrangement. The Court
24 finds that this creditor should not be counted.

25 ///

26 ///

1 **Coastal Community Insurance:**

2 Stanly contends that this creditor did not hold a claim as
3 of the petition date -- that it was paid by Lopez's lender.
4 Lopez argues in his brief that the policy had been renewed as of
5 June 30, 2005 so payments would continue to come due. However,
6 Lopez's declaration is silent as to this alleged creditor. Based
7 upon Lopez's deposition testimony (see Depo. Trans. at 119-25) it
8 does not appear that any amount was owing as of the petition
9 date. The premium for coverage through July, 2005 had been paid.
10 The statement Lopez relied upon in the deposition was for
11 coverage beginning after the petition was filed. See Depo.
12 Trans. at Ex. 20. The Court finds that this creditor should not
13 be counted.

14 **Cox Communications:**

15 Stanly contends that this creditor received postpetition
16 payments in full satisfaction of its obligation. Lopez contends
17 in his brief that payments on this account were made in the
18 ordinary course of business and to maintain service and that most
19 of the payments were made by Noveon -- Lopez's employer.
20 However, Lopez's declaration does not provide any evidence
21 whatsoever with regard to this creditor including of his payment
22 practices with respect to this creditor or payment by his
23 employer. All Lopez does is attach the statement.

24 It seems clear Lopez made postpetition payments to this
25 creditor as authorized under § 303(f). Under § 549(a)(2) these
26 payments would be voidable. Lopez argues that he received value

1 in exchange, but has provided no evidence thereof. Further, the
2 evidence indicates that Lopez owed a prepetition balance (the
3 monthly statement is as of 7/22/05) and that the entire bill was
4 paid postpetition. Thus, to the extent any postpetition value
5 was given by Cox, the amount of the payments would have exceeded
6 this value and thus some portion would be recoverable. Lopez
7 also provides no evidence that payments were made by his
8 employer. The Court finds that this creditor should not be
9 counted.

10 **Ft. Walton Medical Center:**

11 Stanly argues that this claim is subject to a bona fide
12 dispute as to liability. Lopez denies that there is a dispute.
13 Rather, he explains, he initially thought the services would be
14 covered by insurance (because the doctor told him they would),
15 but subsequently accepted that they were not because he did not
16 get prior approval.

17 The Court finds that Stanly has failed to establish that
18 there is a bona fide dispute with regard to this claim. Stanly
19 characterizes Lopez's deposition testimony as admitting that he
20 thought the claim was in dispute. The Court does not agree. All
21 Lopez said at his deposition is that he was sore that the doctor
22 told him the claim would be covered by insurance and he later
23 learned that it was not. He uses the term "dispute" but never
24 actually claims he was not liable on the claim. See Depo. Trans.
25 at 182:5-185:4. The Court finds that this creditor should be
26 counted.

1 **Household Bank:**

2 Stanly contends that this creditor should not be counted
3 because it received preferential payments voidable under § 547.
4 Lopez contends that the payments were made for debts incurred in
5 ordinary course and that they were made to keep the account
6 current per an agreement with Household Bank.

7 Like the payment made to Citicards, these do not appear to
8 be a typical minimum payment situation where the minimum amount
9 due changes based upon the prior month's activity. Rather, Lopez
10 made sporadic payments of differing amounts less than the minimum
11 monthly amount. Lopez has not provided evidence that these
12 payments were made in the ordinary course. The Court finds that
13 this creditor should not be counted.

14 **Kelly Plantation Owners Assoc.**

15 Stanly argues that this creditor should not be counted since
16 it received postpetition payments in full satisfaction of its
17 claim. Lopez contends that these are homeowners association fees
18 owing on his residence and that they were incurred and paid in
19 the ordinary course. He also contends that they are frequently
20 paid from his wife's checking account.

21 As noted above, there is no ordinary course defense to
22 postpetition payments recoverable under § 549. Lopez made
23 postpetition payments to this creditor as authorized under
24 § 303(f). Under § 549(a)(2) these payments are voidable. Lopez
25 provided neither argument nor evidence that he received value in
26 exchange for the payments. Even if he did receive value (common

1 ground maintenance or security for example), the evidence
2 indicates that Lopez owed a prepetition balance and that the
3 entire bill was paid postpetition. Thus, to the extent any
4 postpetition value was given the amount of the payments would
5 have exceeded this value and thus some portion would be
6 recoverable. The Court finds that this creditor should not be
7 counted.

8 **M. Northwest Florida Daily News**

9 In his declaration Lopez admits that this prepetition claim
10 was paid postpetition. The Court therefor finds that this
11 creditor should not be counted.

12 **Okaloosa Gas District:**

13 Lopez admits that he made postpetition payments to this
14 creditor, but that they were made to maintain utility service to
15 his residence. The exhibit provided by Stanly indicates that the
16 payments were less than \$50.00/month. The Court finds that
17 continued utility service constitutes value received in exchange
18 for such payments. Accordingly, the Court finds that this
19 creditor should be counted.

20 **Progressive Insurance:**

21 Stanly contends that this creditor did not hold a claim as
22 of the petition date - that the premiums for the period had been
23 paid prepetition. Lopez has provided no evidence to establish
24 the existence of any claim owing to this alleged creditor. The
25 Court finds that this creditor should not be counted.

26 ///

1 **Citibank/Quicken Platinum Card:**

2 Lopez admits that he made postpetition payments to this
3 creditor and provides no evidence that value was received in
4 exchange. Accordingly, the Court finds that this creditor should
5 not be counted.

6 **Alan Stanley:**

7 Stanly contends that he, Stanly, cannot be counted because
8 he is an "insider" as he and Lopez each own 50% of Prism. The
9 analysis is a bit convoluted, but Stanly appears to be correct.

10 The definition of "insider" includes an "affiliate."
11 § 101(31)(E). An "affiliate" includes a corporation owned more
12 than 20% by the debtor. § 101(2)(B). Thus, Prism is an
13 "affiliate" and "insider" of Lopez. Section 101(31)(E) also
14 provides that an "insider of an affiliate" of the debtor is also
15 an insider of the debtor. Stanly, as owner of more than 20% of
16 Prism, is an insider of Prism under § 101(2)(B), and thus an
17 insider of Lopez under § 101(31)(B) because he is an insider of
18 an affiliate of Lopez.

19 So, Stanly is a "holder of a claim against" Lopez and thus
20 qualifies to be a petitioning creditor under § 301(b)(1).
21 However, for the purposes of determining the number of creditors,
22 he is excluded as an insider under § 301(b)(2). The Court finds
23 that this creditor is not to be counted.

24 **Texaco/Shell:**

25 Lopez admits that he made postpetition payments to this
26 creditor and provides no evidence that value was received in

1 exchange. The Court finds that this creditor should not be
2 counted.

3 **Union Bank:**

4 Again Lopez admits making postpetition payments to this
5 creditor, and provides no evidence that value was received in
6 exchange. The Court finds that this creditor should not be
7 counted.

8 **Valley Forge Life Insurance:**

9 Stanly contends that this creditor did not hold a claim as
10 of the petition date because the premiums for the period had been
11 paid. Also, Lopez is not the account debtor, but rather Madeline
12 Lopez. See Keehn Dec at Exhibit L. Lopez argues that this is a
13 life insurance policy which requires yearly payments. However,
14 he provides no evidence that he, as opposed to Madeline, is the
15 debtor on this account. Accordingly, the Court holds that this
16 claim should not be counted.

17 **Verizon Wireless:**

18 Stanly contends that this claim was subject to a bona fide
19 dispute as of the petition date. It appears from Lopez's
20 testimony at his deposition that Verizon asserted a claim for
21 \$262.47, while Lopez disputed any amount over \$35.00. Lopez
22 eventually paid the disputed portion, but not until August 21,
23 2005 - nearly two months after the petition was filed. In his
24 deposition Lopez explained that he disputed the claim, but that
25 at some point he just got tired of fighting and paid it. He does
26 not say that it was resolved prior to him simply paying the

1 disputed amount. See Depo. Trans. at 151-54. Thus, it appears
2 that as of the petition date, this claim was subject to a bona
3 fide dispute and should not be counted.

4 Alternatively, Lopez admits that this creditor was paid
5 postpetition and provides no evidence of value received in
6 exchange. Accordingly, it should not be counted because it could
7 be voided under § 549. Either way this claim should not be
8 counted.

9 **Wayne Wise:**

10 Stanly alleges that this creditor received a preferential
11 payment of \$900 on April 17, 2005 for interest which had accrued
12 on a note. Lopez argues that the payment was made in exchange
13 for Wise's agreement to extend the maturity date of the note
14 until Lopez could sell his residence.

15 The Court finds that the extension which Lopez received in
16 exchange for the payment is akin to an agreement to forebear an
17 action against the debtor which, although valid consideration for
18 a contract, cannot constitute "new value," within meaning of the
19 new value exception to trustee's preference-avoidance power.

20 See, In re McLean Industries, Inc., 162 B.R. 410 (S.D.N.Y. 1993)
21 (reversed on other grounds 30 F.3d 385). Thus, this creditor
22 should not be counted.

23 **Summary and Conclusion**

24 Based upon the foregoing analysis, the Court finds that of
25 the twenty-two creditors alleged by Lopez, seventeen must be
26 excluded from the count in § 301(b)(2) for one or more of

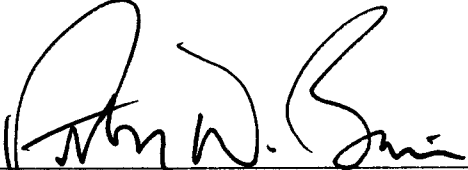
1 the reasons set out in § 301(b). This leaves only five
2 holders of claims against Lopez that qualify to be counted under
3 § 301(b)(2). Since this is clearly "fewer than 12," the petition
4 was properly filed by one claim holder - Stanly.¹

5 The Court does not reach the issue of whether Richard
6 Kipperman (and/or Northwest Florida Daily News) is a proper
7 petitioning creditor (which Lopez disputes), as only one
8 petitioning creditor is required given the Court's ruling.

9 For the reasons set forth above, the Court grants Stanly's
10 motion for summary judgment and denies Lopez's motion for summary
11 judgment on the issue of the number of holders of claims against
12 Lopez for the purposes of § 303(b).

13
14 IT IS SO ORDERED.

15 DATED: SEP 26 2006

16
17 
18 PETER W. BOWIE, Chief Judge
United States Bankruptcy Court
19
20
21
22
23

24
25 ¹ In his opposition to the motion for summary judgment,
26 Lopez alleges another, previously undisclosed creditor - Curd,
Galindo & Smith, LLP. Even if this creditor were included, the
number would still be insufficient to require more than one
petitioning creditor.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re Case No. 05-05926-PBINV


CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

Attorney for Alleged Debtor:	Attorney for Petitioning Creditor Alan Stanly:
M. Jonathan Hayes, Esq. 21800 Oxnard Street, Ste. 840 Woodland Hills, CA 91367	L. Scott Keehn, Esq. 530 B Street, Suite 2400 San Diego, CA 92101

Said envelope(s) containing such document were deposited by me in a regular United States mail box in the City of San Diego, in said district on September 26, 2006.


Barbara J. Kelly, Judicial Assistant

TAB 93

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
Minute Order

Hearing Information:

Debtor: FRANCIS J. LOPEZ
Case Number: 05-05926-PB7 **Chapter:** 7 INVOLUNTARY
Date / Time / Room: MONDAY, MARCH 12, 2007 10:30 AM DEPARTMENT 4
Bankruptcy Judge: PETER W. BOWIE
Courtroom Clerk: MARILYN WILKINSON
Reporter / ECR: LYNETTE ALVES

Matters:

- 2) STATUS CONFERENCE ON INVOLUNTARY PETITION AND ANSWER
(fr. 1/29/07)

- 1) PETITIONING CREDITORS' MOTION TO COMPEL SUPPLEMENTAL RESPONSES TO WRITTEN
DISCOVERY FOR PHASE II OF THE BIFURCATED PROCEEDINGS

Appearances:

M. Jonathan Hayes, ATTORNEY FOR Francis J. Lopez
L. Scott Keehn, ATTORNEY FOR ALAN STANLY, PETITIONING CREDITORS

Disposition:

- 1) Granted. Response due within 30 days of today's date. Issue of sanctions reserved.

- 2) Continued to 5/11/07 at 9:30 a.m.

ASA 0132

TAB 97

Name, Address, Telephone No. & I.D. No.

L. Scott Keehn, SBN 61691
Leslie F. Keehn, SBN 199153
KEEHN & ASSOCIATES
A Professional Corporation
402 West Broadway, Suite 1210
San Diego, California 92101

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA
325 West "F" Street, San Diego, California 92101-6991

In Re
Francis J. Lopez

BANKRUPTCY NO. 05-05926-PBINV

Tax I.D. (EIN) #: _____ /S.S.#:XXX-XX-____ Debtor.

NOTICE OF HEARING AND MOTION

TO: FRANCIS J. LOPEZ, the alleged Debtor herein and his attorney of record.

YOU ARE HEREBY NOTIFIED that on May 11, 2007, at 9:30 a.m.,
in Department No. 4, Room 328 the Jacob Weinberger United States Courthouse, located at 325 West "F" Street,
San Diego, California 92101-6991, there will be a hearing regarding the motion of Petitioning Creditors,
for

(1) STRIKING THE DEBTOR'S ANSWER; (2) ENTERING AN ORDER FOR RELIEF; AND (3) IMPOSING
MONETARY SANCTIONS AGAINST THE DEBTOR

This Motion is supported by the Memorandum of Points and Authorities and the Declaration of L. Scott Keehn filed
concurrently herewith.

Any opposition or other response to this motion must be served upon the undersigned and the original and one copy
of such papers with proof of service must be filed with the Clerk of the U.S. Bankruptcy Court at 325 West "F" Street, San
Diego, California 92101-6991, NOT LATER THAN FOURTEEN (14)¹ DAYS FROM THE DATE OF SERVICE.

DATED: April 13, 2007


/s/ L. Scott Keehn

[Attorney for] Moving Party

¹If you were served electronically or by mail, you have three (3) additional days to take the above-stated actions. **ASA 0133**

CERTIFICATE OF SERVICE

I, the undersigned whose address appears below, certify:

That I am, and at all times hereinafter mentioned was, more than 18 years of age;

That on 13th day of April, 2007, I served a true copy of the within NOTICE OF MOTION AND HEARING by [describe here mode of service]

on the following persons [set forth name and address of each person served] and/or as checked below:

[☒] Attorney for Debtor (if required):

M. Jonathan Hayes
Law Office of M. Jonathan Hayes
21800 Oxnard Street, Suite 840
Woodland Hills, CA 91367

[<input type="checkbox"/>]	For Chpt. 7, 11, & 12 cases:	[<input type="checkbox"/>]	For ODD numbered Chapter 13 cases:	[<input type="checkbox"/>]	For EVEN numbered Chapter 13 cases:
	UNITED STATES TRUSTEE Department of Justice 402 West Broadway, Suite 600 San Diego, CA 92101		THOMAS H. BILLINGSLEA, JR., TRUSTEE 530 "B" Street, Suite. 1500 San Diego, CA 92101		DAVID L. SKELTON, TRUSTEE 525 "B" Street, Suite 1430 San Diego, CA 92101-4507

I certify under penalty of perjury that the foregoing is true and correct.

Executed on April 13, 2007
(Date)

Mark P. Laemmle
(Typed Name and Signature)

402 W. Broadway, Suite 1210
(Address)

San Diego, CA 92101
(City, State, ZIP Code)

ASA 0134

TAB 97-1

1 L. Scott Keehn, SBN 61691
 2 Leslie F. Keehn, SBN 199153
 3 **KEEHN & ASSOCIATES**
 4 A Professional Corporation
 5 402 West Broadway, Suite 1210
 6 San Diego, California 92101
 7 Telephone: (619) 400-2200

8 Attorneys for **Petitioning Creditors**

9 **UNITED STATES BANKRUPTCY COURT**
 10 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

11 In Re:

12 FRANCIS J. LOPEZ,

13 Alleged Debtor.

Case No. 05-05926-PBINV

Involuntary Chapter 7

PETITIONING CREDITORS'
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION
FOR AN ENFORCEMENT ORDER:
(1) STRIKING THE DEBTOR'S ANSWER;
(2) ENTERING AN ORDER FOR RELIEF;
AND (3) IMPOSING MONETARY
SANCTIONS AGAINST THE DEBTOR

[BIFURCATED PHASE II]

Date: May 11, 2007

Time: 9:00 a.m.

Judge: The Honorable Peter W. Bowie

Ctrm: 4

22 The Alleged Debtor — Francis J. Lopez (“Lopez”) — has ignored the Court's order
 23 directing him to supplement his discovery responses by April 11, 2007. Accordingly, pursuant to
 24 Rule 37(d) of the Federal Rules of Civil Procedure (“FRCP”), made applicable to these
 25 proceedings by Rule 9014(c) of the Federal Rules of Bankruptcy Procedure (“FRBP”), Petitioning
 26 Creditors respectfully submit their Motion for an Order from this Court: (1) striking the Answer
 27 filed by Lopez; (2) entering an Order for Relief; and (2) imposing monetary sanctions against
 28 Lopez in the amount of \$4,242.

KEEHN & ASSOCIATES, APC
 ATTORNEYS AND COUNSELORS AT LAW
 402 WEST BROADWAY, SUITE 1210
 SAN DIEGO, CALIFORNIA 92101
 TELEPHONE (619) 400-2200 • FACSIMILE (619) 400-2201

1 **I. INTRODUCTION**

2 *Delays have dangerous ends.*

3 William Shakespeare
4 *Henry VI, Part One*
Act III, Scene ii

5 Francis J. Lopez — Master Scofflaw — is pulling this case and its creditors down the
6 dangerous path of delay by ignoring the court's mandate for compliance with his duties to disclose
7 that which unopposed discovery compels him to disclose. Having paralyzed the case first by his
8 refusal to cooperate, and second by his disobedience to the court's ruling, Lopez remains at liberty
9 to create an unlimited variety of "Priority Gap Claims"¹ which will slip ahead of all of the pre-
10 petition unsecured creditors. The plight of those creditors is exacerbated by the automatic stay
11 which prevents them from taking any enforcement action to preserve the economic utility of their
12 claims.² The risks of prejudice are further heightened by the initial delay that was occasioned by
13 the bifurcation of the case — at Lopez's request — so that the Involuntary Gap Period was
14 necessarily rendered longer than the norm, even before the latest delays were encountered.

15 What mischief has already occurred behind the shield of delay, and what further mischief
16 may yet occur before the Order for Relief is ultimately entered, is impossible to ascertain. But,
17 what can be seen with absolute clarity is that Lopez will not willingly discharge the duties of a
18 litigant to participate in good faith in this process. He has used his *passive/aggressive* tactic of
19 delay to the prejudice of the creditors, and that prejudice must be truncated so that the *dangerous*
20 *end* of an expanding pool of priority claims is held in check.

21 Lopez's disobedience is particularly troubling because it demonstrates that — beyond his
22 willingness to disobey court mandates — he is impervious to the threat of monetary sanctions. At
23 the hearing conducted on March 12, 2007, this Court made clear on the record: (a) the seriousness
24 of Lopez's failure to respond to discovery which he never opposed; (b) its willingness to defer the
25 issue of ruling on the requested sanctions of \$4,242; and (c) its intention that the risk of sanctions

26
27 ¹ See 11 U.S.C. §§502(f) and 507(a)(3).

28 ² See 11 U.S.C. §362(a).

1 was to serve as a *Sword of Damocles* suspended above Lopez to motivate compliance. With that
 2 in mind, the court then gave him another 30 days — to April 11, 2007 — to fully respond to
 3 discovery promulgated five months earlier, on November 3, 2006. But, in response to the court's
 4 clear direction, Lopez has provided nothing but that which Simon & Garfunkel made famous in
 5 the 60's: the *Sounds of Silence*.

6 His silence is anything but golden. It is a badge of dishonor and contempt. It endangers
 7 the creditors' expectations of distributions. It taunts the threat of monetary sanctions. It is
 8 insufferable. It warrants the immediate entry of terminating sanctions.

9 II. FACTUAL AND PROCEDURAL CHRONOLOGY

10 A. Lopez's Four-Month History of Hindering, Delaying and Refusing to Provide 11 Discovery Despite Being Ordered to Do so by this Court

12 11/03/06: Lopez was served with Petitioning Creditors' First Set of Written Discovery
 13 for Phase II (the "Phase II Written Discovery"), consisting of (1) First Phase
 14 II Requests for Admission Propounded by Petitioning Creditors [10
 15 Requests]; (2) First Phase II Request for Production of Documents by
 16 Petitioning Creditors [162 categories of documents]; and (3) First Phase II
 17 Interrogatories Propounded by Petitioning Creditors [35 Interrogatories].
 18 Lopez's responses to the Phase II Written Discovery were due on December
 19 4, 2006.

20 12/03/06: Lopez served "Response to Requests for Admission Propounded to Alleged
 21 Debtor Francis J. Lopez (Phase II)." **Lopez's responses were deficient,**
 22 **and Lopez failed to verify the responses.**

23 12/05/06: Lopez served "Response to Interrogatories Propounded to Alleged Debtor
 24 Francis J. Lopez (Phase II). **Lopez's responses were deficient, and Lopez**
 25 **failed to verify the responses.** Lopez also served "Response to Requests
 26 for Production of Documents." **Lopez's responses were deficient.**

27 12/13/06: Petitioning Creditors' attorney, L. Scott Keehn, sent a *meet and confer* letter
 28 to Lopez's attorney, M. Jonathan Hayes, notifying him of the deficiencies in

Lopez's responses to the Phase II Written Discovery.

- 12/15/06: Attorneys Keehn and Hayes participated in a telephonic *meet and confer* conference wherein the parties agreed that Lopez would provide supplemental responses to the Phase II Written Discovery on or before January 12, 2007.
- 01/12/07: Deadline for Lopez to provide the promised supplemental responses to the Phase II Written Discovery. **Lopez failed, without explanation, to provide supplemental responses to the Phase II Written Discovery.**
- 01/19/07: Attorney Keehn sent a follow-up *meet and confer* letter to attorney Hayes requesting an explanation regarding Lopez's failure to provide the promised supplemental responses to discovery, and notifying Lopez of the imminent likelihood of a motion to compel his responses to the Phase II Written Discovery. **Lopez failed, without explanation, to respond to that *meet and confer* letter.**
- 01/29/07: Petitioning Creditors filed a Motion to Compel responses to the Phase II Written Discovery. **Lopez failed, without explanation, to respond or file an Opposition to that Motion.**
- 03/10/07: On a Saturday, just two days prior to the scheduled hearing on Petitioning Creditors' Motion to Compel Lopez's responses to the Phase II Written Discovery, attorney Hayes emailed approximately 155 pages of documents to attorney Keehn, purportedly in response to the "First Phase II Request for Production of Documents by Petitioning Creditors." **This last-minute "document dump" was improper because the documents: (1) were not responsive to the Requests, (2) were not organized by category of Request, and (3) consisted of at least 103 pages of pleadings filed in the San Diego Superior Court which are already in the Petitioning Creditors' possession. Lopez failed, without explanation, to explain the deficiencies and/or his failure to provide the agreed-upon supplemental**

1 **responses.**

2 03/12/07: This Court granted Petitioning Creditors' motion to compel Lopez to
3 provide supplemental responses to the Phase II Written Discovery.³ The
4 Court ordered Lopez to provide the supplemental responses on or before
5 April 11, 2007. The Court — in open session — indicated that it was
6 deferring its ruling on the request for monetary sanctions of \$4,242 because:
7 (a) it wanted the risk of those sanctions to serve as a *Sword of Damocles* to
8 encourage compliance with the Court's order; and (b) Lopez would have to
9 “work his way out of those sanctions.” **Lopez has failed, without**
10 **explanation, to comply with this Court's Order.**

11 **III. DISCUSSION**

12 **A. Terminating Sanctions are a Necessary and Appropriate Response to Lopez's Brazen** 13 **Disregard for His Discovery Obligations and this Court's Order.**

14 Pursuant to FRCP Rule 37(d), made applicable to these proceedings by FRBP Rule
15 9014(c), this Court has broad discretion to strike Lopez's Answer and enter an Order for Relief as
16 a sanction for Lopez's continued, unreasonable refusal to provide discovery.⁴ Where, as here, an
17 alleged debtor has engaged in a course of conduct clearly designed to avoid his discovery
18 obligations, the seemingly “harsh” sanction of striking the debtor's answer and adjudicating him a
19 bankrupt is both appropriate and necessary to avoid encouraging “a blatant disregard for the
20 discovery mechanism.”⁵

21 Lopez's responses to the Phase II Written Discovery (served on November 03, 2006) were
22 due on December 4, 2006. Four months have now passed since that original production date, and
23 Petitioning Creditors have yet to receive Lopez's responses, or even a reasonable justification for
24 _____

25 ³ See, Docket Item #93.

26 ⁴ *Matter of Visioneering Const.*, 661 F.2d 119, 123 - 124 (9th Cir. 1981); *In re Rice*,
27 14 B.R. 843, 846 (9th Cir.BAP 1981).

28 ⁵ *In re Rice*, supra, 14 B.R. at 846; *Matter of Visioneering Const.*, supra, 661 F.2d at
123 (court's order striking alleged debtor's answer was an appropriate sanction since the debtor
had “deliberately and obstinately refused to cooperate with discovery requests and court orders”).

the delay. And that is not because Petitioning Creditors have not been trying. As set forth in Section I above, Petitioning Creditors made multiple efforts to *meet and confer* with Lopez before obtaining this Court's Order compelling Lopez to provide the discovery he promised to produce three months ago – on January 12, 2007. Unfortunately, this Court's Order has had even less impact on Lopez than Petitioning Creditors' efforts – Lopez has totally ignored this Court's Order without even feigning compliance, e.g., with an eleventh-hour *document dump*. That act was pure theater, and did nothing to cure the deficiencies in Lopez's discovery responses.

B. Lopez's Discovery Abuse is Unfairly Prejudicial to Existing Creditors.

Lopez's strategic delaying of these proceedings unfairly exposes all creditors to unnecessary prejudice, the extent of which is currently unknown, in that Lopez is free to incur new debt that will be superior to the claims of all pre-petition creditors due to the priority status given to gap claims under 11 U.S.C. §502(f).⁶ As we approach June 30, 2007, which will be the second anniversary of the petition, the specter of an ever-expanding body of gap claims looms as an ominous threat to the economic utility of the Bankruptcy remedy sought by the Petitioning Creditors. It is ironic, inequitable and intolerable that the creditors should continue to be exposed to that peril because Lopez refuses to comply with both his discovery obligations and the orders of the Court. Lopez's game-playing must stop now so that this estate can proceed toward a fair and orderly administration. At the same time, all creditors deserve to have the prejudice caused by Lopez's willful disregard of the Court's order neutralized. Since there is no way to turn back the hands of time or undo any gap claims that Lopez may have created in his period of non-compliance, terminating sanctions is the only way to do that.

C. The Deferred Monetary Sanctions Should Now Be Imposed.

In its Order,⁷ dated March 12, 2007, this Court deferred ruling on Petitioning Creditors' request for monetary sanctions as set forth in their Motion to compel Lopez's responses to the

⁶ See, 11 U.S.C. §507(a)(3).

⁷ See, Docket Item #93.

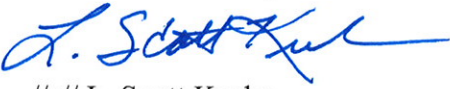
1 Phase II Written Discovery.⁸ Petitioning Creditors hereby renew their request for monetary
2 sanctions in the amount of \$4,242, consisting of the attorneys' fees incurred by Petitioning
3 Creditors in bringing that Motion, as though fully set forth herein.

4 **IV. CONCLUSION**

5 Based on all of the foregoing, Petitioning Creditors respectfully request that this Court
6 issue an Order: (1) striking the Debtor's Answer; (2) entering an Order for Relief; and
7 (3) imposing monetary sanctions against Lopez in the amount of \$4,242.

8
9 Dated: April 13, 2007

KEEHN & ASSOCIATES
A Professional Corporation

10
11 
12 By: //s/ L. Scott Keehn
13 L. Scott Keehn
14 Attorneys for **Petitioning Creditors**

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8 See, Docket Item #91.

TAB 97-2

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 Leslie F. Keehn, SBN 199153
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 402 West Broadway, Suite 1210
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Attorneys for **Petitioning Creditors**

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In Re:

FRANCIS J. LOPEZ,

Alleged Debtor.

) Case No. 05-05926-PBINV

) Involuntary Chapter 7

) **DECLARATION OF L. SCOTT KEEHN IN**
) **SUPPORT OF PETITIONING**
) **CREDITORS' MOTION FOR AN**
) **ENFORCEMENT ORDER: (1) STRIKING**
) **THE DEBTOR'S ANSWER; (2) ENTERING**
) **AN ORDER FOR RELIEF; AND (3)**
) **IMPOSING MONETARY SANCTIONS**
) **AGAINST THE DEBTOR**

) **[BIFURCATED PHASE II]**

) Date: May 11, 2007

) Time: 9:00 a.m.

) Judge: The Honorable Peter W. Bowie

) Ctrm: 4

I, L. Scott Keehn, declare:

1. I am an attorney at law, duly licenced to practice before all courts of this State, and before the United States District Court for the Southern District of California. I am a shareholder of the firm Keehn & Associates APC, attorneys of record for Petitioning Creditors. I have personal knowledge of the factual matters stated herein.

2. On November 03, 2006, my office served Lopez with Petitioning Creditors' First Set of Written Discovery for Phase II (the "Phase II Written Discovery"), consisting of (1) First

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1 Phase II Requests for Admission Propounded by Petitioning Creditors [10 Requests]; (2) First
 2 Phase II Request for Production of Documents by Petitioning Creditors [162 categories of
 3 documents]; and (3) First Phase II Interrogatories Propounded by Petitioning Creditors [35
 4 Interrogatories]. Lopez's responses to the Phase II Written Discovery were due on December 4,
 5 2006.

6 3. On December 03, 2006, Lopez served his "Response to Requests for Admission
 7 Propounded to Alleged Debtor Francis J. Lopez (Phase II)." **Lopez's responses were deficient,
 8 and Lopez failed to verify the responses.**

9 4. On December 05, 2006, Lopez served his "Response to Interrogatories Propounded
 10 to Alleged Debtor Francis J. Lopez (Phase II). **Lopez's responses were deficient, and Lopez
 11 failed to verify the responses.** At the same time, Lopez served his "Response to Requests for
 12 Production of Documents." **Lopez's responses were deficient.**

13 5. On December 13, 2006, I sent a *meet and confer* letter to Lopez's attorney, M.
 14 Jonathan Hayes, notifying him of the deficiencies in Lopez's responses to the Phase II Written
 15 Discovery.

16 6. On December 15, 2006, attorney Hayes and I participated in a telephonic *meet and*
 17 *confer* conference wherein the parties agreed that Lopez would provide supplemental responses to
 18 the Phase II Written Discovery on or before January 12, 2007.

19 7. On January 12, 2007 – the Deadline for Lopez to provide the promised
 20 supplemental responses to the Phase II Written Discovery – **Lopez failed, without explanation,
 21 to provide supplemental responses to the Phase II Written Discovery.**

22 8. On January 19, 2007, I sent a follow-up *meet and confer* letter to attorney Hayes
 23 requesting an explanation regarding Lopez's failure to provide the promised supplemental
 24 responses to discovery, and notifying Lopez of the imminent likelihood of a motion to compel his
 25 responses to the Phase II Written Discovery. **Lopez failed, without explanation, to respond to
 26 that *meet and confer* letter.**

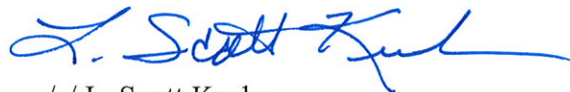
27 9. On January 29, 2007, Petitioning Creditors filed a Motion to Compel responses to
 28 the Phase II Written Discovery. **Lopez failed, without explanation, to respond or file an**

1 **Opposition to that Motion.**

2 10. On March 10, 2007 – a Saturday, just two days prior to the scheduled hearing on
 3 Petitioning Creditors’ Motion to Compel Lopez’s responses to the Phase II Written Discovery –
 4 attorney Hayes emailed me approximately 155 pages of documents, purportedly in response to the
 5 “First Phase II Request for Production of Documents by Petitioning Creditors.” **This last-minute**
 6 **“document dump” was improper because the documents: (1) were not responsive to the**
 7 **Requests, (2) were not organized by category of Request, and (3) consisted of at least 103**
 8 **pages of pleadings filed in the San Diego Superior Court which are already in the Petitioning**
 9 **Creditors’ possession. Lopez failed, without explanation, to explain the deficiencies and/or**
 10 **his failure to provide the agreed-upon supplemental responses.**

11 11. On March 12, 2007, I appeared at the hearing during which this Court granted
 12 Petitioning Creditors’ motion to compel Lopez to provide supplemental responses to the Phase II
 13 Written Discovery.¹ The Court ordered Lopez to provide the supplemental responses on or before
 14 April 11, 2007. The Court — in open session — indicated that it was deferring its ruling on the
 15 request for monetary sanctions of \$4,242 because: (a) it wanted the risk of those sanctions to serve
 16 as a *Sword of Damocles* to encourage compliance with the Court's order; and (b) Lopez would
 17 have to “work his way out of those sanctions.” **Lopez has failed, without explanation, to**
 18 **comply with this Court’s Order.**

19 I declare under penalty of perjury under the laws of the United States that the foregoing is
 20 true and correct, and that this Declaration was executed this 13th day of April, 2007, at San Diego,
 21 California.



22 /s/ L. Scott Keehn
 23 L. Scott Keehn

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 1 See, Docket Item #93.

TAB 97-3

L. Scott Keehn (SBN 61691)
KEEHN & ASSOCIATES
 A Professional Corporation
 402 West Broadway, Suite 1210
 San Diego, California 92101
 Telephone: (619) 400-2200

 Attorneys for **Petitioning Creditors**

UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In Re: FRANCIS J. LOPEZ, Debtor.) Bankruptcy Case No. 05-05926-PB7)) PROOF OF SERVICE)) Date: March 12, 2007) Time: 10:30 a.m.) Dept: 4) Judge: Hon. Peter W. Bowie
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I, the undersigned, declare that I am over the age of eighteen years and not a party to this cause. I am employed in, or am a resident of, the County of San Diego, California, and my business address is: 402 West Broadway, Suite 1210, San Diego, California.

On the date shown below, I caused to be served the following document(s):

**NOTICE OF HEARING AND MOTION (1) STRIKING THE DEBTOR'S ANSWER;
 (2) ENTERING AN ORDER FOR RELIEF; AND (3) IMPOSING MONETARY
 SANCTIONS AGAINST THE DEBTOR**

**PETITIONING CREDITORS' MEMORANDUM OF POINTS AND AUTHORITIES
 IN SUPPORT OF MOTION FOR AN ENFORCEMENT ORDER**

**DECLARATION OF L. SCOTT KEEHN IN SUPPORT OF PETITIONING
 CREDITORS' MOTION FOR AN ENFORCEMENT ORDER**

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1 [✓] BY MAIL: I declare that I am readily familiar with the business practice for collection and
2 processing of correspondence for mailing with the United States Postal Service, that the
3 correspondence shall be deposited with the United States Postal Service this same day in the
4 ordinary course of business; and that a true copy was placed in a separate envelope, with
5 postage thereon fully prepaid for each addressee named hereafter:

6 **M. Jonathan Hayes**
7 **Law Office of M. Jonathan Hayes**
8 **21800 Oxnard Street, Suite 840**
9 **Woodland Hills, CA 91367**

10 I declare under penalty of perjury under the laws of the United States that the foregoing is
11 true and correct.

12 Executed on April 13, 2007.

13 
14 **MARK P. LAEMMLE**

15 KEEHN & ASSOCIATES, APC
16 ATTORNEYS AND COUNSELORS AT LAW
17 402 WEST BROADWAY, SUITE 1210
18 SAN DIEGO, CALIFORNIA 92101
19 TELEPHONE (619) 400-2200 · FACSIMILE (619) 400-2201
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TAB 102

L. Scott Keehn, SBN 61691
 Leslie F. Keehn, SBN 199153
KEEHN & ASSOCIATES
 A Professional Corporation
 402 West Broadway, Suite 1210
 San Diego, California 92101
 Telephone: (619) 400-2200
 Attorneys for **Petitioning Creditors**

**UNITED STATES BANKRUPTCY COURT
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

In Re:	Case No. 05-05926-PBINV
FRANCIS J. LOPEZ,	Involuntary Chapter 7
Alleged Debtor.	NOTICE OF WITHDRAWAL OF PETITIONING CREDITORS' MOTION FOR AN ENFORCEMENT ORDER: (1) STRIKING THE DEBTOR'S ANSWER; (2) ENTERING AN ORDER FOR RELIEF; AND (3) IMPOSING MONETARY SANCTIONS AGAINST THE DEBTOR
	[BIFURCATED PHASE II]
	Date: May 11, 2007
	Time: 9:30 a.m.
	Judge: The Honorable Peter W. Bowie
	Ctm: 4

**TO: THE HONORABLE PETER W. BOWIE, JUDGE OF THE UNITED STATES
 BANKRUPTCY COURT, CLERK OF THE COURT, ALL PARTIES-IN-
 INTEREST AND THEIR ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE that Petitioning Creditors respectfully withdraw their Motion for an Enforcement Order: (1) Striking the Debtor's Answer; (2) Entering an Order for Relief; and (3) Imposing Monetary Sanctions Against the Debtor (the "Motion"), filed on April 13, 2007, as Docket Entry No. 97. The Motion is withdrawn in light of the letter dated April 18, 2007, from M. Jonathan Hayes, attorney for the Debtor, to L. Scott Keehn, attorney for the Petitioning

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1 Creditors, a copy of which is attached hereto marked Exhibit "A" and incorporated herein by this
2 reference. The Petitioning Creditors withdraw the Motion without prejudice, and with a full
3 reservation of their rights, including but not limited to, their right to object to the substantive
4 sufficiency of discovery responses received.

5
6 Dated: April 18, 2007

KEEHN & ASSOCIATES
A Professional Corporation

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9 By: //s// L. Scott Keehn
L. Scott Keehn
Attorneys for **Petitioning Creditors**

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EXHIBIT “A”

Law Offices of
M. Jonathan Hayes

21800 Oxnard St. Suite 840
Woodland Hills, CA 91367

tel: 818.710-3656

fax: 818.710-3659

www.jonhayes.net

M. Jonathan Hayes
jhayes@polarisnet.net

April 18, 2007

By Fax only 619 400-2201

L. Scott Keehn

Keehn & Associates

402 W Broadway Ste 1210

San Diego, CA 92101

Re: In re Francis Lopez,
Case No. 05-05926-PBINV
Discovery Responses

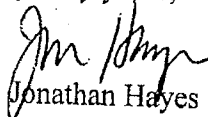
Dear Scott,

Per our telephone conversation yesterday, my son Desmond mailed the discovery responses to you on April 11, 2007. I remember looking at the thick envelope that morning to make sure we had your new address. I do not have a postage machine. We use the one in the suite I am in. I checked with them about whether the date can even be "backdated." I learned that it can be advanced to a future date but not reversed.

Anyway, we certainly mailed the responses on time. You told me that with this letter you would take the Motion to Strike the Answer off calendar. This does not waive any rights you may have re the substance of the responses.

If you have any questions, please do not hesitate to call.

Very truly yours,


M. Jonathan Hayes

MJH/dh
Cc: Francis Lopez

ASA 0150

TAB 104

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
Minute Order

Hearing Information:

Debtor: FRANCIS J. LOPEZ
Case Number: 05-05926-PB7 **Chapter:** 7 INVOLUNTARY
Date / Time / Room: FRIDAY, MAY 11, 2007 09:30 AM DEPARTMENT 4
Bankruptcy Judge: PETER W. BOWIE
Courtroom Clerk: MARILYN WILKINSON
Reporter / ECR: COLLETTA BROOKS

Matter:

STATUS CONFERENCE ON INVOLUNTARY PETITION AND ANSWER
(fr. 3/12/07)

Appearances:

M. Jonathan Hayes, ATTORNEY FOR Francis J. Lopez
L. Scott Keehn, ATTORNEY FOR ALAN STANLY

Disposition:

Continued to 6/25/07 at 10:30 a.m.
Debtor's supplemental responses to written discovery to be filed by 5/21/07.
Any Motion to Compel to be filed and served by 5/25/07 for hearing on 6/25/07 at 10:30 a.m.

ASA 0151